TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1906.

No. 263.

THE UNITED STATES, APPELLANT,

vs.

THE WILLIAM CRAMP AND SONS SHIP AND ENGINE BUILDING COMPANY.

No. 264.

THE WILLIAM CRAMP AND SONS SHIP AND ENGINE BUILDING COMPANY, APPELLANT,

vs.

THE UNITED STATES.

APPEALS FROM THE COURT OF CLAIMS.

FILED APRIL 20, 1906.

(20210 AND 20211)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1906.

No. 263.

THE UNITED STATES, APPELLANT,

vs.

THE WILLIAM CRAMP AND SONS SHIP AND ENGINE BUILDING COMPANY.

No. 264.

THE WILLIAM CRAMP AND SONS SHIP AND ENGINE BUILDING COMPANY, APPELLANT,

vs.

THE UNITED STATES.

APPEALS FROM THE COURT OF CLAIMS.

INDEX.

	Original.	Print.
Caption	1	1
Petition	1	1
Exhibit W. C. & S. No. 1. Contract of November 19, 1890	10	5
Exhibit W. C. & S. No. 2. Contract of May 10, 1894	31	16
Traverse	33	17
Argument and submission	34	17
Findings of fact	35	17
Conclusion of law	41	23
Opinion	41	23
Judgment	56	38
Application by defendant for appeal	57	38
Allowance of appeal of defendant	57	38
Clerk's certificate	58	38
Application by claimant for appeal	59	39
Allowance of appeal of claimant	59	39
Clerk's certificate	59	39

1 In the Court of Claims.

THE WILLIAM CRAMP AND SONS SHIP AND ENGINE Building Company, claimant, v. THE UNITED STATES. } No. 20858.

I.—*Original petition.*

[Filed August 10, 1897.]

To the honorable Chief Justice and Judges of the Court of Claims:

The petition of the William Cramp and Sons Ship and Engine Building Company respectfully represents:

I.

That it is a citizen of the United States and of the State of Pennsylvania, being a body corporate and politic duly incorporated under the laws of the State of Pennsylvania, and carries on the business of ship and engine building; that its yards, plant, and works are located in the city of Philadelphia, in the State of Pennsylvania.

2 II.

That on the 19th day of November, A. D. 1890, your petitioner, in conformity with the laws of the United States in that behalf, entered into a contract with the United States, through its Secretary of the Navy, for the construction of a seagoing coast-line battle ship, designated as No. 1 and subsequently named the "Indiana," according to the specifications attached to said contract, at and for the sum of $3,063,000, a copy of which contract is hereto annexed, marked "Exhibit W. C. & S. No. 1," and prayed to be read as part hereof.

III.

That according to the terms of said contract the said battle ship "Indiana" was to be completed and delivered to the United States within three years from the date of said contract, and certain onerous penalties were reserved to be imposed upon your petitioner in the event that the completion and delivery of the said vessel was delayed beyond that period through the fault or delay of your petitioner.

IV.

That by the terms of the said contract it was provided that the United States should furnish within the times and in the order necessary to carry on the work properly all the armor, armor bolts, and their accessories, to be used in the construction of the vessel (except that required for the construction of the protective deck), your petitioner being required to furnish the working drawings and templates necessary for the construction of the armor within ten months from the date of the contract.

3

V.

That immediately upon the signing of said contract your petitioner proceeded to prepare the necessary working drawings and templates according to the design of said vessel and promptly furnished them to the Navy Department, but the Department decided to use nickel steel in the construction of the armor, which it was found could not be bent to the contemplated curves, and the said plans and templates were thereby rendered useless, and new sets of both had to be prepared; yet, notwithstanding, your petitioner supplied the second set within the time required by the said contract.

VI.

That your petitioner also commenced work on the said vessel and organized a corps of competent and skilled mechanics and proceeded vigorously with the work, so that the vessel had, on or about the 4th day of November, 1891, reached a stage of progress at which the delivery of the diagonal armor plates became imperatively necessary; yet, notwithstanding the United States was kept constantly advised and urged to furnish the same, none were furnished until about June 6, 1892, and their delivery was not completed until January 3, 1893; that the delivery of other armor was unreasonably delayed, that for the armor belt being begun in August, 1894, more than a year after it was needed, and finished February 27, 1895; more than a year was consumed in harveyizing the plates aftey they had been furnished according to the original plan, growing out of the decision of the Department to substitute the harveyized plates for the original plates; that other necessary material was

4 not furnished until October 30, 1895, which delayed the completion of the vessel until November 19, 1895, causing a delay of two years, occasioned by the failure of the United States to perform the stipulations of the said contract on its part to be performed.

VII.

That by reason of the said several delays and defaults on the part of the United States your petitioner was put to great extra cost and expense and subjected to great loss and damage by being stopped and interrupted in its work and making it necessary for it to provide special arrangements in shops for tools and appliances, preparing an extra dock and keeping the same in repair for two years; for the care and maintenance of said vessel, including coal, wages, covers, extra painting, tug hire, and other like expenditures during said period.

VIII.

That the said vessel was completed to such a stage by the 14th of April, 1894, that your petitioner advised the Department that it would be ready on May 1, 1894, for its trial trip, but the Secretary of the Navy declined to permit such trip to be made at that time, but delayed its official trip for a period of twenty-one months after said date, but a special trial trip was made at an extra cost of $17,514.94.

IX.

That by reason of the unreasonable delay in making said official trial trip the bottom of the vessel became foul from lying at the dock for said period of twenty-one months, which fact greatly impaired her speed, so that, notwithstanding the extra cost your petitioner had incurred to increase the speed of the vessel over contract requirements in order to receive the speed premiums provided in said contract, the vessel only reached a speed premium of fifty thousand dollars ($50,000), although almost showing a speed equal to a premium of one hundred thousand dollars ($100,000), which last-mentioned premium would have accrued but for the foul bottom that existed because of the delays hereinbefore set forth.

X.

That by reason of said delays your petitioner, as required by the eighth paragraph of the contract, was compelled during all the additional period of time to keep the vessel insured against loss by fire and pay additional premiums therefor, and to borrow money to carry on the work and pay interest therefor by reason of being deprived of the payments that would have otherwise accrued to it, and which would have rendered the payment of said interest by it unnecessary.

XI.

That on or about the 1st of May, 1894, when your petitioner had applied for an official trial trip for said vessel, and when there had been earned by your petitioner and there was then justly due to your petitioner a very large sum of money, for the want of which your petitioner had been compelled to borrow money at abnormal rates of interest, and when large losses and damages had accrued to your petitioner by reason of some of the delays hereinbefore set forth, the Secretary of the Navy, while admitting and confessing that the delays in the completion of the vessel had been brought about by the default of the United States, and that losses and damages had accrued to your petitioner by reason thereof, unconscionably, unreasonably, and unlawfully, and taking advantage of the financial necessities of your petitioner, and, to coerce your petitioner into a relinquishment of its claim for damages that had then accrued to it by reason of the delays and defaults of the United States, refused to permit a trial trip for said vessel and refused to pay to your petitioner any of the sums of money then earned and due to it unless your petitioner would agree to release its claim upon the United States on account of said losses and damages.

XII.

That thereupon, and under the said unlawful coercion and dures imposed by the said Secretary of the Navy upon your petitioner, your petitioner did sign and deliver to the said Secretary of the Navy an agreement of said character, a copy of which is hereto annexed and marked "Exhibit W. C. & S., No. 2," and prayed to be read as part hereof.

XIII.

But your petitioner avers that no consideration for said release was given by the said United States, and no money was paid to your petitioner other than moneys that had been earned by your petitioner and which were arbitrarily and unlawfully being withheld, and your petitioner avers that said pretended release, having been secured by coercion and duress and without consideration, is utterly null and void and of no effect or legal force, and your petitioner prays that under the equity powers of the court the same may be annulled, cancelled, and set aside.

7

XIV.

Your petitioner further says that it fully complied with and completed its said contract and did all the work and extra and additional work required and ordered, to the satisfaction of the United States, and the said vessel was delivered and accepted by the United States on or about the 18th day of November, 1895, and that but for the delays heretofore set forth the same would have been completed and delivered on or before the 18th day of November, 1893.

XV.

That by reason of said delays as aforesaid you petitioner has suffered the losses and damages as follows, to wit:

For time of organization and plant lost in waiting for armor, materials, etc., to be furnished by United States	$144,379.50
For special wharfage, 730 days, at 1 cent per ton per day	74,825.00
For general care and maintenance of vessel, including coal, firemen, engineers, watchman, canvas awnings, wooden covers, keeping clean, removing snow, dust, etc., extra painting, tug hire, moving derrick, etc., 730 days, at $135 per day	98,550.00
Additional cost of insurance	34,462.55
Interest on money borrowed caused by delays of United States which prolonged final settlement	60,499.91
Extra trial trip made necessary by construction and completion of vessel being delayed by United States	17,514.94
Carried forward	430,231.90
8 Brought forward	430,231.90
For loss due to running the official trial of "Indiana" with a foul bottom, as owing to the delay caused in the completion of the vessel it was impossible to clean and paint the bottom	50,000.00
Total	480,231.90

The premises considered, your petitioner prays judgment against the United States in this behalf for the sum of four hundred and eighty thousand two hundred and thirty-one dollars and ninety cents ($480,231.90) and the costs of this suit.

THE WILLIAM CRAMP AND SONS SHIP AND
ENGINE BUILDING COMPANY,
By CHAS. H. CRAMP, *President.*
JNO. C. FAY,
Attorney for Claimant.

JOS. K. MCCAMMON,
EPPA HUNTON,
C. F. [illegible]

STATE OF PENNSYLVANIA,
County of Philadelphia:

Chas. H. Cramp, being duly affirmed, says that he is the president of The William Cramp and Sons Ship and Engine Building Company, a corporation of the State of Pennsylvania, the claimant in the foregoing petition; that he has heard read the foregoing petition and knows the contents thereof and that the matters and things therein stated
9 are true to the best of his knowledge and belief and that no assignment of the said claim has been made.

CHAS. H. CRAMP.

Subscribed and sworn to before me this ninth day of August, A. D. 1897.

[SEAL.] ISAAC ARROTT,
Notary Public.

10 EXHIBIT W. C. & S. No. 1.

Contract for the construction of a seagoing coast-line battle ship of about 10,000 tons displacement.

"COAST-LINE BATTLE SHIP NO. 1."

Contract, of two parts, made and concluded this 19th day of November, A. D. 1890, by and between The William Cramp and Sons Ship and Engine Building Company, a corporation created under the laws of the State of Pennsylvania, and doing business at Philadelphia, in said State, represented by the President of said corporation, party of the first part, and the United States, represented by the Secretary of the Navy, party of the second part.

Whereas the act entitled "An act making appropriations for the naval service for the fiscal year ending June thirtieth, eighteen hundred and ninety-one, and for other purposes," approved June 30th, 1890, authorized the construction of three seagoing coast-line battle ships, to be constructed in accordance with certain provisions contained in the act entitled "An act to increase the naval establishment," approved August 3d, 1886, and to be, in all their parts, of domestic manufacture;

And whereas, after due advertisement, the proposal of the said party of the first part for the construction of the hull and machinery of two of said vessels, including fittings and equipment, and the fitting, fixing, placing, and securing of all their armor, one of which vessels is, for the purposes of this contract, designated and known as "Coast-line Battle Ship No. 1," has been duly accepted by the Secretary of the Navy;

11 And whereas the drawings, plans, and specifications required by the said acts have been duly provided, adopted, and approved, in accordance with the provisions of said Act of June 30th, 1890.

Now, therefore, this contract witnesseth that, in consideration of the premises, and for and in consideration of the payments to be made as hereinafter provided for, the party of the first part, for itself and its suc-

cessors and assigns and its legal representatives, does hereby covenant and agree to and with the United States, as follows—that is to say:

First. The party of the first part will, at its own risk and expense, construct, in accordance with the provisions of the acts of Congress relating thereto, and in conformity with the aforesaid drawings, plans, and specifications, one seagoing coast-line battle ship of about ten thousand ton's displacement, with fittings and equipment as specified, of the following principal dimensions:

	Feet.	Inches.
Length on load line	344	00
Extreme breadth	69	00
Depth in hold from top of main-deck beams to inner bottom	33	00

Such vessel to be constructed of steel, of domestic manufacture, and to be provided and fitted with machinery, engines, and boilers, also of domestic manufacture, complete in all their parts, appurtenances, and spare parts, and in all respects as described in the annexed drawings, plans, and specifications, and in the aforesaid acts of Congress, and will deliver the same at the navy-yard, League Island, Pennsylvania, to such person as the Secretary of the Navy may designate; it being, however, expressly understood and agreed, that if any article or thing included in, or covered by, the drawings, plans, and specifications aforesaid shall be found,
12 during the prosecution of the work under this contract, to be not produced or manufactured in the United States, and if, after reasonable effort, it shall be found impracticable to obtain the same as an article of domestic manufacture, then and in such case provision shall be made, by or with the approval of the Secretary of the Navy, for such alteration in the drawings, plans, and specifications, or for the adoption of such new or different device or plan as may be found necessary in order to carry out and complete this contract, subject, as to increased or diminished compensation by reason of such change, to the conditions applicable to changes as expressed in the second clause of this contract.

Second. The construction of the hull and machinery and the fittings and equipment of the vessel herein contracted for shall conform in all respects to and with the drawings, plans, and specifications above referred to, which drawings, plans, and specifications are hereto annexed and shall be deemed and taken as forming part of this contract with the like operation and effect as if the same were incorporated herein. No omission in the drawings, plans, or specifications of any detail, object, or provision necessary to carry this contract into full and complete effect, in accordance with the object and intent of the acts of Congress above referred to, shall operate to the disadvantage of the United States, but the same shall be satisfactorily supplied, performed, and observed by the party of the first part, and all claims for extra compensation by reason of, or for, or on account of, such extra performance, are hereby, and in consideration of the premises, expressly waived; and it is hereby further provided, and this contract is upon the express condition, that the drawings, plans, and specifications aforesaid shall not be changed in any respect, when
13 the cost of such change shall, in the execution of the work, exceed five hundred dollars, except upon the written order of the Secretary or Acting Secretary of the Navy; that, if changes are thus made, the actual cost thereof, and the damage, if any, caused thereby shall be ascertained, estimated, and determined by a board of naval officers,

appointed by the Secretary of the Navy; that the party of the first part shall be bound by the determination of said board, or a majority thereof, as to the amount of increased or diminished compensation which the said party of the first part shall be entitled to receive, if any, in consequence of such change or changes, and that if all the changes authorized increase the cost of constructing the vessel, and premiums are earned under this contract by the party of the first part, such of said increased cost, as results from changes tending to increase the speed of the vessel, shall be deducted from such premiums in the final settlement under this contract.

Third. The party of the first part will, within ten months from the date of this contract, furnish all working drawings and templates necessary to show the dimensions and shape of each and every armor-plate required for use in the construction of the vessel herein contracted for, including those to be used in the construction of the belt, turrets, redoubts, barbettes, conning-tower, gun shields, ammunition tubes, and in the protection of the guns and loading positions, and the position and sizes of the bolt-holes therein—the spacing and dimensions of said bolt-holes to be in accordance with the specifications and subject to the approval of the Secretary of the Navy; it being expressly understood and agreed that the party of the first part shall furnish all the armor, armor bolts, and their accessories, and all the labor and material required in the
14 construction of the protective deck; that the party of the second part shall furnish all other armor, armor bolts, and their accessories, to be used in the construction of the vessel, including such as may be required in the construction of the belt, turrets, redoubts, barbettes, conning-tower, gun-shields, ammunition tubes, and in the protection of the guns and loading positions, trim such armor plates to the drawing or template sizes and shapes within reasonable manufacturing limits, as set forth in the specifications, and drill and tap all necessary holes therein, as shown by said approved drawings and templates, and deliver said armor, armor-bolts, and their accessories, at such reasonable place or places in the shipyard of the party of the first part, as may be designated by the party of the first part, and within the times and in the order required to carry on the work properly; and that the party of the first part shall, at its own risk and expense, properly fit, fix, place, and secure all the armor to the vessel, including the belt, turrets, redoubts, barbettes, conning-tower, gun-shields, ammunition tubes, and protection of the guns and loading positions, and furnish all other materials and labor required in the construction of said vessel and her machinery, fittings, and equipment, as called for by the aforesaid drawings, plans and specifications; provided, however, and it is expressly understood, covenanted, and agreed, that if, upon the completion of said vessel, including hull, fittings, machinery, engines, boilers and appurtenances, and equipment and all other work required under this contract, except the fitting, fixing, placing and securing of the armor for her side-belt, casemate, turrets, redoubts, barbettes, and conning-tower, the party of the second part shall not have commenced the delivery of such armor to the party of the first part, then
and in such case the vessel shall be subjected to the trial provided
15 for in the tenth clause of this contract, and if, at and upon such trial, all the conditions and requirements relating thereto, except as to the fitting, fixing, placing, and securing of the armor for the side-

belt, casemate, turrets, redoubts, barbettes, and conning-tower, shall be fulfilled the vessel shall be accepted as provided for in the eleventh clause of this contract; and if the party of the second part shall not have commenced the delivery of the armor for the side-belt, casemate, turrets, redoubts, barbettes, or conning-tower when the vessel is ready for her final trial, or within five months after either a preliminary or a conditional acceptance of the vessel, said vessel shall be finally accepted, and the cost of fitting, fixing, placing, and securing the armor for the side-belt, casemate, turrets, redoubts, barbettes, and conning-tower shall be ascertained, estimated, and determined by a board of naval officers appointed by the Secretary of the Navy, the party of the first part shall be bound by the determination of said board, and such cost shall be deducted from the contract price of the vessel in the final settlement under this contract; but if the party of the second part shall commence and continue with reasonable diligence the delivery of the armor for the side-belt, casemates, turrets, redoubts, barbettes, or conning-tower of said vessel prior to her final trial, or within five months after either a preliminary or a conditional acceptance of the vessel, the party of the first part shall fit, fix, place, and secure all the armor to the vessel in accordance with the requirements of this contract and the drawings, plans, and specifications hereto annexed.

Fourth. The materials and workmanship used and applied in the construction of the hull, machinery, fittings, and equipment of the vessel herein contracted for, and in the fitting, fixing, placing, and securing of her armor, in details and finish, shall be first class and of the very
16 best quality, and shall, from the beginning to the end of the work, be subject to the inspection of the Secretary of the Navy; it being hereby expressly understood, covenanted, and agreed that the said Secretary may appoint suitable inspectors, to whom the party of the first part shall furnish such samples, and such information as to the quality thereof and the manner of using the same, as may be required, and also any assistance such inspectors may require in determining the weight and quality of steel and other metals, and of wood and other materials, either used or intended for use in the construction of said vessel, her machinery, fittings, or equipment, or in the fitting, fixing, placing, and securing of her armor, and that the inspectors may, with the approval of the said Secretary, peremptorily reject any unfit material or forbid the use thereof. The inspectors shall, at all times during the progress of the work, have full access thereto, and the party of the first part shall furnish them with full facilities for the inspection and superintendence of the same.

Fifth. The steel to be used in the construction of the hull (including the protective deck), machinery, and appurtenances of the vessel herein contracted for, except that used in the construction of her armor, shall conform to the "Specifications for inspection of steel for use in the construction of the hulls and machinery of coast-line battle ships Nos. 1, 2, and 3, and cruiser (protected) No. 12, for the United States Navy," approved by the Secretary of the Navy under date of September 1st, 1890, which specifications are annexed to and form a part of this contract.

Sixth. The party of the first part will, at its own expense, prepare such plans or drawings as may be necessary during the progress of the work,

and will submit the same to the Navy Department for approval before the material is ordered or the work commenced.

17 Seventh. The party of the first part, in consideration of the premises, hereby covenants and agrees to hold and save the United States harmless from and against all and every demand or demands of any nature or kind for, or on account of, the adoption of any plan, model, design, or suggestion, or for or on account of the use of any patented invention, article, or appliance which has been or may be adopted or used in or about the construction of the hull, machinery, fittings, or equipment of said vessel, or any part thereof, or in fitting, fixing, placing, and securing her armor, under this contract, and to protect and discharge the Government from all liability on account thereof, or on account of the use thereof, by proper releases from patentees or otherwise, and to the satisfaction of the Secretary of the Navy.

Eighth. The hull, machinery, fittings, and equipment of the vessel herein contracted for, and all materials and appliances provided for and used, or to be used, in the construction thereof, shall be kept duly insured, which insurance shall be renewed and increased, from time to time, by and at the expense of the party of the first part, the loss, if any, to be stated in the policies, as payable to the United States; the insurance to be effected in such manner and in such companies as shall be approved by the Secretary of the Navy, and in an amount to be fixed, from time to time, by him, not exceeding the amount of advance payments made under this contract.

Ninth. The vessel herein contracted for, including her hull, machinery, fittings, and equipment, with all her armor fitted, fixed, placed, and secured, as aforesaid, shall be completed and ready for delivery to the United States on or before the expiration of three years from the date of this contract; but the lien of the United States upon said

18 hull, machinery, fittings, and equipment, and the materials on hand for use in the construction of the vessel, respectively and collectively, for all moneys advanced on account thereof, shall commence with the first payment, and shall thereupon attach to the work done and materials furnished, and shall, in like manner, attach from time to time, as the work progresses, and as further payments are made, and shall continue until it shall have been properly discharged. In case the completion of the vessel, her machinery, fittings, and equipment, and the fitting, fixing, placing, and securing of all her armor, as aforesaid, shall be delayed beyond the said period of three years, deductions shall be made from the contract price of the vessel for each and every day (excepting Sundays) during the continuance of such delay, and until the vessel, including her machinery, fittings, and equipment, and the fitting, fixing, placing, and securing of all her armor, shall be completed and ready for delivery to the United States, as follows, viz: During the three months next succeeding the expiration of said period, seventy-five dollars ($75) per day; during the fortieth, forty-first, and forty-second months from the date of this contract, one hundred and fifty dollars ($150) per day; and for each and every day (excepting Sundays) during which such completion shall be delayed beyond the period of three years and six months from the date of this contract, two hundred dollars ($200) per day—all such deductions from the contract price of the vessel to be

made, from time to time, from any payment or payments falling due under this contract; provided, however, that such delay shall not have been caused by the act of the party of the second part, or by fire or water, or by any strike or stand-out of workmen employed in the construction of the hull, machinery, fittings, or equipment, of said vessel, or in the fitting, fixing, placing, and securing of her armor, or by other circum-
19 stances beyond the control of the party of the first part; but such circumstances shall not be deemed to include delays in obtaining materials when such delays arise from causes other than those herein specified; provided, further, that in case of any such alleged delay, the party of the first part shall give immediate notice thereof in writing to the Secretary of the Navy.

In case any question shall arise under this contract, concerning premiums over and above, or deductions from, the contract price of the vessel herein contracted for, such question, with all the facts relating thereto, shall be submitted to the Secretary of the Navy for consideration, and his decision thereon shall be conclusive and binding upon the parties to this contract.

All delays which the Secretary of the Navy shall find to be properly attributable to the Navy Department, or to its authorized officers or agents, or any or either of them, and to have been a delay operating upon the final completion of the vessel within the time specified therefor in this contract, shall entitle the party of the first part to a corresponding extension of the period herein prescribed for the completion of the vessel; provided, however, that no delay attributed by the party of the first part to the Navy Department, its officers or agents, or the alleged cause or causes thereof, shall be considered by the Secretary of the Navy unless the party of the first part shall, at the time of the occurrence of such delay, notify him in writing of the facts and cirumstances in each case, and of the extent to which the said party of the first part claims that the final completion of the vessel is thereby delayed.

Tenth. The party of the first part hereby further covenants and agrees that the vessel to be constructed under this contract shall be suf-
20 ficiently strong to carry her armor, and the armament, equipment, coal, stores, and machinery prescribed by the Secretary of the Navy and indicated in the annexed drawings, plans, and specifications; that the total weight of said machinery, including engines, boilers, and appurtenances; all fixtures in engine and fire rooms; smoke pipes; distilling apparatus; and water in boilers, condensers, pumps, pipes and stern tubes—but not including turret machinery, stores, heating apparatus, spare parts, tools in workshop, capstan, windlass, steering gear or winches—shall not exceed eight hundred and seventy-five (875) tons, this weight to be determined from the certified records of the actual weight of the parts of the machinery as they are sent on board the vessel to be connected up, except the weight of the contained water, which shall be calculated from the actual volumes in steaming condition, as shown on the certified drawings of the completed machinery, the weight to be calculated for salt water, except for those parts where fresh water only is used; that if said total weight (875 tons) be exceeded, a deduction of five hundred dollars ($500) per ton shall be made from the contract price of the vessel for each ton of excess weight over that stipulated (875 tons), and

that if said weight (875 tons) be exceeded by five per cent, a further deduction of ten thousand dollars ($10,000) shall be made from the contract price of the vessel—all such deductions to be made from any payment or payments falling due under this contract; and that when the vessel is completed and ready for delivery to the United States, as required by the drawings, plans and specifications, she shall be subjected to a trial trip, in the open sea, under conditions prescribed or approved by the Secretary of the Navy, to test the hull and fittings, the machinery, including engines, boilers, and appurtenances, the equipment, and the
21 speed of the vessel, and that such vessel shall be accepted only on fulfillment of, and subject to, the conditions and agreements hereinafter set forth:

(1) That the working of the machinery in all its parts shall be to the satisfaction of the Secretary of the Navy.

(2) The party of the first part hereby guarantees that the speed developed by said vessel upon said trial, under conditions prescribed or approved by the Secretary of the Navy, shall be not less than an average of fifteen (15) knots per hour, maintained successfully for four (4) consecutive hours, during which period the air pressure in the fire-room shall not exceed one inch of water—the vessel to be weighted to a mean draught of twenty-four (24) feet, it being mutually understood, covenanted and agreed that for every quarter knot of speed so exhibited and maintained above said guarantee (15 knots) the party of the first part shall receive a premium, over and above the contract price of the vessel, of twenty-five thousand dollars ($25,000), and that for every quarter knot that said vessel fails of reaching said guaranteed speed (15 knots), there shall be deducted from the contract price the sum of twenty-five thousand dollars ($25,000).

(3) That said vessel, including hull, fittings, machinery, engines, boilers, and appurtenances, and equipment, and the fitting, fixing, placing, and securing of her armor, and all other work required under this contract, shall be found to be strong and well built, and well performed, and in strict conformity with the contract, drawings, plans, and specifications, and shall be approved by the Secretary of the Navy; provided that if, at and upon said trial, there shall be any failure in the vessel, including hull, fittings, machinery, engines, boilers, and appurtenances, and equipment, and the fitting, fixing, placing, and securing of her armor, to meet fully the requirements of this contract, the party
22 of the first part shall be entitled to make further trials, sufficient in number to reasonably demonstrate the capabilities of the vessel; and provided also that the number of trials shall be determined and limited by the Secretary of the Navy, and that the expenses of a successful trial shall be paid by the party of the second part, but that any unsuccessful trial of the vessel or her machinery, prior to her "preliminary" or "conditional" acceptance, shall be at the expense of the party of the first part.

Eleventh. If, at and upon the trial trip before mentioned, the foregoing requirements and conditions relating to the hull, fittings, and machinery, and equipment, of said vessel, and to the fitting, fixing, placing, and securing of her armor shall be fulfilled, and if the speed (15 knots) guaranteed as aforesaid shall be developed and maintained as aforesaid, then and in such case the vessel shall be preliminarily accepted, and pay-

ment of the last three instalments of the contract price of the vessel, and of all reservations, shall be made, subject, however, to a special reserve of sixty thousand dollars ($60,000) from and out of the reservations hereinafter provided for; but if the speed developed and maintained by said vessel, during such trial, shall fall below the speed (15 knots) guaranteed as aforesaid, she shall be conditionally accepted, subject to deductions, as aforesaid, from the contract price of the vessel on account of her failure to reach the speed (15 knots) guaranteed as aforesaid; provided, however, that all the other requirements and conditions of this contract, relating to the hull, fittings, and machinery, and equipment, of said vessel, and to the fitting, fixing, placing, and securing of her armor, shall have been fulfilled; and that, in case of such conditional acceptance, the twenty-eighth, twenty-ninth, and thirtieth instalments of the contract
23 price of the vessel, and the reservations on payments under this contract, shall constitute a reserve fund which shall be applicable to or towards the satisfaction of such deductions from the contract price, and shall be retained by the party of the second part for that purpose.

In case of a "preliminary" acceptance of said vessel the said "special reserve" of sixty thousand dollars ($60,000), or in case of a "conditional" acceptance of said vessel the said "reserve fund," or so much thereof as may, in the judgment of the Secretary of the Navy, be necessary, shall be held until the vessel has been finally tried, after being fully equipped, armed (or weighted correspondingly), and in all respects complete and ready for sea, under conditions prescribed or approved by the Secretary of the Navy; provided that such final trial shall take place within five months from and after the date of the "preliminary" or the "conditional" acceptance of the vessel.

If, at and upon such final trial, or at any time within five months after either a "preliminary" or a "conditional" acceptance of said vessel, such final trial not having taken place, any weakness or defect in the hull, fittings, or equipment, due to either defective workmanship or defective materials, or in the fitting, fixing, placing, and securing of the armor, due to defective workmanship, shall appear, the same shall be corrected and repaired to the satisfaction of the Secretary of the Navy, and at the expense of the party of the first part; or if at any time during said period the machinery, or any part or parts thereof, shall be found to be defective in construction with respect to either workmanship or materials, or if there shall be any failure, breaking down, or deterioration, other than that due to fair wear and tear, of any part or parts of the machinery, engines, boilers, or appurtenances, the same shall be corrected and repaired, to the satisfaction of the Secretary of the
24 Navy, at the expense of the party of the first part; and the party of the first part may, if it so desires, have an engineer of its own selection present in the engine room of said vessel at any time or times during said period, who shall have full opportunity to observe and inspect the working of the machinery in all its parts, but without any directing or controlling power over the same, and in case such engineer shall be a civilian his compensation shall be paid by the party of the first part.

If the vessel be not in readiness for such final trial within five months from the date of her "preliminary" or "conditional" acceptance through no fault or delay on the part of the party of the first part, and no weakness or defects in the hull, fittings, or equipment, or in the machinery,

including engines, boilers, and appurtenances, due to either defective workmanship or defective materials, or in the fitting, fixing, placing, and securing of the armor, due to defective workmanship, shall have appeared, then the vessel shall be finally accepted, and the said "special reserve," or the surplus, if any, of the said "reserve fund," paid, subject, however, to deduction on account of any reductions that may be made in the contract price of the vessel under the provisions of this contract.

Twelfth. The Department having provided, as foundation for this contract, drawings, plans, and specifications of a vessel which it has reason to think would, if properly carried out, result in the production of a speed of not less than fifteen (15) knots per hour, assumes no responsibility with reference thereto, and will consider any changes suggested by the party of the first part, either as to hull or machinery, and, as the responsibility is with the party of the first part, will feel it to be its duty to deal liberally with any proposed changes, so long as the size, strength, and character of the vessel shall remain substantially
25 the same, changes in plans or specifications involving increased or decreased expense to be dealt with as provided for in the second clause of this contract.

Thirteenth. It is further mutually understood, covenanted, and agreed that, in case of the failure or omission of the party of the first part, at any stage of the work prior to final completion, from any cause or causes other than those specified in the ninth clause of this contract, to go forward with the work and make satisfactory progress towards its completion within the prescribed period, it shall be optional with the Secretary of the Navy to declare this contract forfeited. The party of the first part shall thereupon, and on notice thereof in writing, be, and the said party of the first part does hereby, in consideration of the premises, for itself and its successors and assigns, and its legal representatives, acknowledge itself to be justly indebted to the United States, as for liquidated and ascertained damages, in a sum equal to the aggregate amount of all advanced payments theretofore made to it for, or on account of, work done under this contract, and does further, as aforesaid, covenant and agree to refund the same on demand, or within sixty days thereafter, and that the United States shall and may hold, as collateral security for such refund, said vessel, machinery, materials, fittings, and equipments, or so much thereof as shall then have been constructed or furnished, or as shall be on hand for the purposes of construction. The Secretary of the Navy shall thereupon cause to be taken and filed a full and complete statement and inventory of all work done or commenced in, upon, or about the hull, machinery, fittings, and equipment of said vessel, and in the fitting, fixing, placing, and securing of her armor, and of all materials on hand applicable thereto, the property of the
26 party of the first part, and shall cause the same to be duly valued by a board, consisting of not less than five persons, qualified by knowledge and experience for the discharge of their duties, to be appointed by the Secretary of the Navy, which board shall proceed without unnecessary delay to examine such work and materials and ascertain and declare the fair market value thereof, including a reasonable and customary margin of profit upon so much of the work as shall have been, at the time such forfeiture is declared, satisfactorily performed; and upon such

examination the party of the first part may attend, and, if it so desires, by counsel, and submit such evidence as the board may deem proper.

Fourteenth. Upon receipt of the report and finding of said board, and upon his approval thereof, the Secretary of the Navy may, in his discretion, proceed to complete said vessel, including her machinery, fittings, and equipment, and the fitting, fixing, placing, and securing of her armor, and all other work required under this contract, in accordance with the contract, drawings, plans, and specifications, using for that purpose all suitable materials on hand and included in the inventory aforesaid; and the title to said vessel, machinery, fittings, and equipment, or so much thereof as shall have been completed, and to all such materials shall forthwith vest in the United States; and the party of the first part does hereby, for itself and its successors and assigns, and its legal representatives, covenant and agree to and with the United States that, on receiving notice of the intention of the Secretary of the Navy to proceed to the completion of the work, it will surrender said vessel, machinery, fittings, and equipment, and all materials on hand, together with the use of the yard or "plant," and all machinery, tools, and appliances appertaining thereto and theretofore used or necessarily to be used in and about the completion of the work.

27 Fifteenth. In case the Secretary of the Navy shall proceed, under the foregoing clause, to complete the work, such procedure shall be without unnecessary delay, and shall be at the risk and expense of the party of the first part, which party shall be chargeable with any increase in the cost of materials or labor incurred by reason of its failure to perform this contract. Upon the final settlement of the liability of the party of the first part, an account shall be stated substantially as follows:

The party of the first part shall be charged—

1. With all advance payments.

2. With the extra cost, if any, of materials and labor, and all other extra expenses, if any, over and above the contract price, incurred in the completion of the work.

The party of the first part shall then be credited with the value of the work done up to the time of suspension, and of the materials on hand, as ascertained by the board, under the provisions of the thirteenth clause of this contract, and approved by the Secretary of the Navy, and with such advance payments, if any, as may have been refunded. If a balance shall thereupon appear in favor of the party of the first part, the same shall be paid to and accepted by the said party of the first part in full discharge of all claims under this contract; but if a balance shall appear in favor of the United States, the party of the first part hereby covenants and agrees as aforesaid to pay and discharge the same on demand.

Sixteenth. It is mutually understood, covenanted, and agreed, by and between the respective parties hereto, that it shall not, under any circumstances, be obligatory upon the party of the second part to accept or pay for the vessel, or any part thereof, to be constructed under this contract, unless she shall have been completed in strict conformity with

28 this contract, and in accordance with the provisions of the acts of Congress relating thereto, and that this qualification shall be deemed and taken as applicable and applying to each and every clause, covenant, and condition, express or implied, in this contract contained.

Seventeenth. It is mutually understood, covenanted, and agreed, by and between the respective parties hereto, that this contract shall not, nor shall any interest therein, be transferred by the party of the first part to any other person or persons.

Eighteenth. It is hereby mutually and expressly covenanted and agreed, and this contract is upon the express condition, that no member of or delegate to Congress, officer of the Navy, or any person holding any office or appointment under the Navy Department, shall be admitted to any share or part of this contract, or to any benefit to arise therefrom; but this stipulation, so far as it relates to members of or delegates to Congress, shall not be construed to extend to this contract, it being made with an incorporated company.

Nineteenth. The United States, in consideration of the premises, do hereby contract, promise, and engage, to and with the party of the first part as follows:

1. The contract price to be paid for the vessel, machinery, fittings, and equipment, to be constructed and furnished in accordance with this contract, including the fitting, fixing, placing, and securing of her armor, shall be three million and twenty thousand dollars ($3,020,000), but if the length of the vessel be increased, the cost of such increase shall be added to such price.

2. Payments shall be made by the United States in thirty equal instalments, as the work progresses, with a reservation of ten per cent from each instalment.

29 3. No payment shall be made except upon bills, in triplicate, certified by the inspectors, in such manner as shall be directed by the Secretary of the Navy, whose final approval of all bills thus certified shall be necessary before payment thereof.

4. All warrants for payments under this contract shall be made payable to the party of the first part or its order.

5. The payment of the last three instalments shall not be made except as provided for in the eleventh clause hereof.

6. When all the conditions, covenants, and provisions of this contract shall have been performed and fulfilled by and on the part of the party of the first part, said party of the first part shall be entitled within ten days after the filing and acceptance of its claim, to receive the said "special reserve," or the surplus, if any, of the said "reserve fund," or so much of either as it may be entitled to, on the execution of a final release to the United States, in such form as shall be approved by the Secretary of the Navy, of all claims of any kind or description under or by virtue of this contract.

Twentieth. If any doubts or disputes arise as to the meaning of anything in the drawings, plans, or specifications, or if any discrepancy appear between said drawings, plans, or specifications and this contract, the matter shall be at once referred to the Secretary of the Navy for determination, and the party of the first part hereby binds itself and its successors and assigns, and its legal representatives, to abide by his decision in the premises. The interlineation of the words "and continue with reasonable diligence" in the thirty-seventh line of this contract was made before signing.

In witness whereof, the respective parties have hereunto set their hands and seals the day and year first above written.

30 Signed and sealed in the presence of—

THE WM. CRAMP & SONS SHIP & ENGINE BUILDING CO.,
By (signed) CHAS. H. CRAMP, [L. S.]
President.

Attest:
HENRY W. CRAMP, *Secretary.*

THE UNITED STATES, [L. S.]
By (s) B. F. TRACY,
As Secretary of the Navy.

(s) WM. B. REMEY,
Judge-Advocate-General,
As to B. F. Tracy, Secretary of the Navy.

31 EXHIBIT W. C. & S. No. 2.

Memorandum of agreement relative to change in contract for construction of "Indiana," dated May 10, 1894.

It is hereby agreed, by and between the William Cramp and Sons Ship and Engine Building Company, a corporation, party of the first part, and the United States, represented by the Secretary of the Navy, party of the second part, this tenth day of May, 1894, that the contract made on the 19th of November, 1890, between the parties hereto, for the construction of Coast-line Battle Ship No. 1, the "Indiana," be altered and amended as follows, viz:

So much of said contract as provides for the payment to the party of the first part of the last three installments of the contract price, and of the amount reserved from the previous payments, only after a trial trip and a preliminary or a conditional acceptance of the vessel by the United States, is hereby rescinded and in lieu thereof it is hereby agreed, as part of said contract, that the party of the second part shall pay to the party of the first part so much of the aggregate amount of the last three installments of the contract price and of the amount of the reservations from previous payments as will leave in the hands of the party of the second part an amount sufficient, in the judgment of the Secretary of the Navy, to cover the special reserve of sixty thousand dollars ($60,000) provided for in the eleventh clause of the contract, the cost of all unfinished work and all deductions likely to be made on account of deficiencies in speed and all contingencies that are liable to arise. But such payment shall not be made until the party of the first part has given bond with approved security conditioned for the return to the party of the second part
32 of the amount so paid, upon demand being made by the Secretary of the Navy therefor, for indemnity of the party of the second part against loss or injury by reason of such payment, and in consideration of such advance payment the party of the first part hereby releases the party of the second part from all and every claim for loss or damage hitherto sustained by reason of any failure on the part of the party of the second part to comply with its contract or on account of any delay hitherto occasioned by the action of said party of the second part.

It is further stipulated and agreed that the said contract, as hereby modified, shall remain in all other respects unchanged and unaffected in its legal effect by said modification.

In witness whereof the respective parties hereto have hereunto set their hands and seals the day and year first above written.

Signed and sealed in the presence of—

THE WM. CRAMP & SONS SHIP & ENGINE BUILDING COMPANY,
By CHAS. H. CRAMP, *President.*

Attest: HENRY W. CRAMP, *Secretary.*

THE UNITED STATES,
By W. McADOO,
As Acting Secretary of the Navy.

SAM'L C. LEMLY,
Judge-Advocate-General,
As to W. McAdoo, Acting Secretary of the Navy.

33 In the Court of Claims of the United States. Term A. D. 1905–1906.

II.—*Traverse—Filed March 21, 1905.*

THE WILLIAM CRAMP & SONS SHIP AND ENGINE Building Company
v.
THE UNITED STATES. } No. 20858.

And now comes the Attorney-General, on behalf of the United States, and, answering the petition of the claimant herein, denies each and every allegation therein contained; and asks judgment that the petition be dismissed.

L. A. PRADT,
Assistant Attorney-General.

34 III.—*Argument and submission of case.*

This case was argued by Mr. Fay for the claimants and by Mr. Binney for the defendants on the 21st, 22nd, and 23rd days of November, 1905, and submitted.

35 IV.—*Findings of fact, conclusion of law, and opinion of the Court—Filed January 29, 1906.*

THE WILLIAM CRAMP AND SONS SHIP AND ENGINE Building Company
v.
THE UNITED STATES.

This case having been heard by the Court of Claims, the court, upon the evidence, makes the following

FINDINGS OF FACT:

I.

The claimant herein is a corporation incorporated under the laws of the State of Pennsylvania, and carries on the business of ship and engine building, with its yards and plant and works located in the city of Philadelphia, in said State.

II.

On November 19, 1890, the claimant entered into a contract with the United States, through their Secretary of the Navy, whereby, in consideration of the sum of $3,063,000, to be paid as provided in said contract, it agreed to construct and complete within three years from said date as in said contract provided, a seagoing, coast-line battle ship, designated as No. 1, and subsequently named the "Indiana," all in accordance with the specifications attached to and made a part of said contract, which contract, marked "Exhibit W. C. & S. No. 1," is annexed to and made a part of the petition herein.

III.

Immediately after the making of said contract the claimant arranged and systematized a working programme for the construction of said vessel by organizing its working force so as to cooperate with each other in harmony on coordinate work, and to secure economy in the construction of the vessel within the contract time and to escape the penalties imposed thereby for delays. The claimant would have completed the vessel within the contract period if it had not been for the failure of the United States to furnish materials within the time and in the order to properly carry on the work which by the terms of the contract they had agreed to furnish.

By reason of the failure of the defendants to furnish the materials, which by the third clause of the contract they had agreed to furnish, within the time and in the order as aforesaid, the completion of the vessel was delayed for two years beyond the contract period.

36 The armor to be furnished in accordance with said clause of the contract was obtained by the defendants from other contractors, who, without any fault on the part of the claimant, failed to complete the manufacture thereof in time for the defendants to deliver the same to the claimant as they had agreed to do.

The various kinds of armor, including the necessary bolts, nuts, etc., were delivered as follows:

Diagonal armor, beginning June 6, 1892, and ending July 3, 1892.

Casemate armor, beginning March 16, 1893, and ending May 1, 1893.

Conning tower tube, May 1, 1893.

Barbette armor, beginning July 10, 1893, and ending September 23, 1893.

Sponson armor, beginning December 2, 1893, and ending March 24, 1894.

Ammunition tubes, beginning April 24, 1894, and ending May 22, 1894.

Eight-inch turret, beginning September 22, 1894, and ending December 7, 1894.

Conning tower shield and covers, complete, October 5, 1894.
Side armor beginning August 13, 1894, and ending August 6, 1895.
Thirteen-inch turrets, beginning May 16, 1895, and ending September 5, 1895.

IV.

On December 4, 1895, and after the completion and delivery of the vessel at the time hereinafter stated, the Secretary of the Navy decided that the cause of delay for the period of two years in the completion of the vessel was due to the failure of the United States to furnish the claimant the materials contracted to be furnished by them within the time and in the order to properly carry on the work; and for that reason the time within which to complete the vessel, and thereby release the claimant from the penalties provided for in the 19th paragraph of the contract, was on said date extended by the Secretary of the Navy a corresponding length of time, to wit, to November 19, 1895, on which latter date the vessel so contracted for was completed and delivered.

V.

On May 10, 1894, before the Secretary of the Navy had finally decided the cause of delay, as aforesaid, and before there had been a preliminary or conditional acceptance of the vessel, owing to the failure of the defendants to furnish, in the order required, the material which they had agreed to furnish, the contract was modified, which modification is made a part of the petition herein and marked "Exhibit W. C. & S. No. 2," by the terms of which modification the defendants agreed to pay the claimant a portion of the reservations of installments, which under the original contract were not payable, as therein set forth, until after a preliminary or conditional acceptance of the vessel; and $234,830, being the amount of the reservations of the first 23 out of the 27 installments earned by the claimant, were paid on or about June 20, 1894. The claimant, as provided in the modification aforesaid, furnished security against any loss to the defendants on account of such payment, but no demand for any
37 refund was ever made upon it. In consideration of the payment aforesaid, the claimant, as recited in said modification, released the defendants "from all and every claim for loss or damage hitherto sustained by reason of any failure on the part of the" defendants to comply with its contract, "or on account of any delay hitherto occasioned" by them.

To the modification of the contract and the release as aforesaid, the claimant at the time does not appear to have made objection or protest.

VI.

On May 18, 1896, after the completion and delivery of the vessel, in accordance with the sixth paragraph of the nineteenth clause of the contract, the balance of the money due thereunder, but withheld in accordance therewith until the final acceptance of the vessel, was paid to the claimant and the same was accepted and a release and receipt was executed therefor by it in the terms following:

Whereas by the eleventh clause of the contract dated November 19, 1890, by and between The William Cramp and Sons Ship and Engine

Building Company, a corporation created under the laws of the State of Pennsylvania, and doing business at Philadelphia, in said State, represented by the president of said company, party of the first part, and the United States, represented by the Secretary of the Navy, party of the second part, for the construction of a seagoing coast-line battle ship of about ten thousand tons displacement, which, for the purpose of said contract is designated and known as "Coast-line battle ship No. 1," it is agreed that a special reserve of sixty thousand dollars ($60,000) shall be held until the vessel shall have been finally tried; provided that such final trial shall take place within five months from and after the date of the preliminary or the conditional acceptance of the vessel; and

Whereas by the sixth paragraph of the nineteenth clause of said contract it is further provided that when all the conditions, covenants, and provisions of said contract shall have been performed and fulfilled by and on the part of the party of the first part, said party of the first part shall be entitled, within ten days after the filing and acceptance of its claim, to receive the said special reserve or so much thereof as it may be entitled to on the execution of a final release to the United States in such form as shall be approved by the Secretary of the Navy of all claims of any kind or description under or by virtue of said contract; and

Whereas the final trial of said vessel was completed on the eleventh day of April, 1896; and

Whereas all the conditions, covenants and provisions of said contract have been performed and fulfilled by and on the part of the party of the first part;

Now, therefore, in consideration of the premises, the sum of forty-one thousand one hundred and thirty-two dollars and eighty-six cents ($41,132.86), the balance of the aforesaid special reserve ($60,000), to which the party of the first is entitled, being to me in hand paid by the United States, represented by the Secretary of the Navy, the receipt whereof is hereby acknowledged, The William Cramp and Sons Ship and Engine Building Company, represented by me, Charles H. Cramp,
38 president of said corporation, does hereby for itself and its successors and assigns, and its legal representatives, remise, release, and forever discharge the United States of and from all and all manner of debts, dues, sum and sums of money, accounts, reckonings, claims, and demands whatsoever, in law or in equity, for or by reason of, or on account of, the construction of said vessel under the contract aforesaid.

In witness whereof I have hereunto set my hand and affixed the seal of The William Cramp & Sons Ship and Engine Building Company this eighteenth day of May, A. D. 1896.

[SEAL.] CHAS. H. CRAMP, *President.*

Attest:

JOHN DOUGHERTY, *Secretary.*

to the giving of which release and receipt the claimant does not appear at the time to have objected or protested.

VII.

Before and during the period of delay, as aforesaid, the claimant's business was so large that in order to obtain more room for materials

for the vessels under construction at the claimant's yard, of which the "Indiana" was one, it purchased additional ground, at a cost of $121,756.03, and erected thereon temporary shops, in which to handle and rehandle material, at an additional cost of $3,000. It is not shown that the purchase of said real estate was necessary to the construction of the "Indiana," or that any portion of the outlay therefor was attributable to the vessel during the period of delay.

VIII.

After the expiration of the contract period and during the two years that the vessel was delayed in completion, as hereinbefore found, the reasonable value for the use of the claimant's yard, machinery, and tools, and for superintendence in the construction of the vessel, including the general upkeep of the yard chargeable to the "Indiana," was $3,000 per month, or $72,000 for the two years' delay.

The proportion of said expenses chargeable to the "Indiana" from May 10, 1894, the date of the release set forth in Finding V, being for one year six months and nine days, was $54,887.67.

IX.

For the proper care and protection of the vessel during the two years' delay, including expense of cleaning the bottom, furnishing material and painting, temporary awnings and tents over caps left for the introduction of turrets, additional scaling to remove rust before painting, electric lighting, keeping up steam to prevent freezing of valves, wetting down decks, going over machinery, and keeping vessel free from snow, dust, ice, and débris, the reasonable cost was $48,000.

The proportion of said expenses for the period from May 10, 1894, being for one year six months and nine days, was $36,591.78.

39

X.

The customary rate of wharfage of merchant vessels at the port of Philadelphia during the time the "Indiana" was being constructed was 1 cent per net registered ton, and upon that basis, if allowed, the wharfage on the "Indiana," with a net tonnage which we find was 3,203.58, during said two years' delay was $32 a day, or $23,360.

The proportion of expense during the period from May 10, 1894, being for one year six months and nine days, was $17,808, inclusive of the dredging of the basin or bed in which to accommodate the vessel.

The claimant also incurred an expense of $5,783 for tug service in removal of the vessel from time to time. Such expense is not shown to have been necessary to the construction of the vessel during the period of delay. It appears to have been for the benefit and convenience of the claimant.

XI.

During the two years' delay the claimant was required to and did keep the vessel insured for the benefit and protection of the United States,

and the reasonable cost thereof aggregated during said period the sum of $34,463.55.

The proportionate expense for the period from May 10, 1894, being one year six months and nine days, was $26,272.55.

XII.

March 23, 1894, the claimant notified the Secretary of the Navy that the vessel, other than the fitting of the armor, had reached a stage of completion ready for an official trial and proposed to offer said vessel therefor between May 1 and 10 following.

Seven other vessels built by the claimant for the United States had been permitted to go on trial trips before their completion. The "Indiana" was the first battle ship constructed, and before the armor was completed thereon the claimant proposed on official trial.

March 9, 1894, the Secretary of the Navy addressed to the claimant the following letter:

WASHINGTON, *March 9, 1894.*

GENTLEMEN: In view of the fact that the trial of the "Indiana" will take place at an early date, and as you are probably now making preparation therefor, your attention is invited to the tenth clause of the contract for the construction of that vessel, which provides that the expenses of a successful trial of the vessel shall be borne by the Government.

With a view to an expeditious settlement of the bill for the trial expenses of the vessel after the trial shall have taken place, the Department has to-day directed Chief Engineer J. W. Thomson and Naval Constructor J. F. Hanscom, United States Navy, to inform themselves as to what expenses you incur in preparing the vessel for trial, on the trial, and in furnishing the supplies of all kinds to be used, in order that they may be able to report to the Department after such examination, if any, as they may be required to make of your bill as to whether the items included therein are properly chargeable to the Government, and as to whether the prices charged therefor are proper and reasonable.

The Department requests that you will confer with the above-named officers in regard to the expenses necessary to be incurred in the trial of the "Indiana," and afford them such information as will enable them to fully comply with the Department's instructions, as above stated.

Very respectfully,

H. A. HERBERT,
Secretary of the Navy.

The WILLIAM CRAMP & SONS
SHIP AND ENGINE BUILDING COMPANY,
Philadelphia, Pa.

The expense so incurred was verified by such officers and no objection was found to the amount thereof. But in the meantime the Secretary of the Navy was in doubt as to whether the vessel was ready for such official trial, and to ascertain that fact did, on April 12, 1894, appoint a board, consisting of three naval officers, to inquire into the matter.

The board made such inquiry, and on April 18, 1894, reported to the Secretary that the hull of the vessel was about eighty-four one-hundredths completed, and that but one-half of the armor had been fitted in place. The board unanimously reported that the vessel was not then and would not be by May 1, 1894, ready for the official trial trip in accordance with the tenth article of the contract, and that such trial should not, in the interest of the Government, take place until the vessel was fully completed and ready for delivery.

Upon that report the Secretary acted, refusing to give his approval to the proposed trial, and the same was not made.

If the claimant is entitled to recover the expense so incurred in the preparation for the preliminary trial of the vessel, the amount, as verified by the officers of the Navy, and which we find reasonable, was $17,514.94.

XIII.

The items of cost and expense set forth in the several findings herein, both upon the basis of two years' delay and of one year six months and nine days' delay, are as follows:

Finding.	Item.	Two years.	One year 6 months and 9 days.
VIII	Superintendence and unkeep of yard	$72,000.00	$54,887.67
IX	Protection of vessel, cleaning, painting, etc	48,000.00	36,591.78
X	Wharfage of vessel	23,360.00	17,808.00
XI	Insurance on vessel	34,463.55	26,272.55
		177,823.55	135,560.00

41 CONCLUSION OF LAW.

Upon the foregoing findings of fact the court decides as a conclusion of law that the claimant is entitled to recover against the United States the loss and damage sustained by it during the delay of one year six months and nine days, as set forth in Finding XIII, the sum of one hundred and thirty-five thousand five hundred and sixty dollars ($135,560).

PEELLE, Ch. J., delivered the opinion of the court:

The claimant alleges, and the findings show, that through the fault of the officers and agents of the United States, it was delayed two years in the execution of its contract for the construction of the coast-line battle ship "Indiana," by reason of which, notwithstanding a corresponding extension of time was allowed, it suffered great damage; hence this action.

A contract was entered into November 18, 1890, by the terms of which the claimant was, for the consideration of $3,063,000, to construct and complete within three years from that date, in accordance with the specifications made a part of the contract, a seagoing, coast-line battle ship, designated as "No. 1," and subsequently named the "Indiana."

On December 4, 1895, and after the vessel had been completed and delivered, the Secretary of the Navy decided that the cause of the delay for the two years in the completion of the vessel was due to the failure of the United States to furnish the materials which by the terms of the contract they had agreed to furnish, in the order required, to properly carry on the work; and for that reason the claimant was granted a corresponding extension of time for the completion of the vessel.

On May 10, 1894, before the Secretary of the Navy had determined the cause of the delay and before the vessel had been preliminarily accepted, the contract had been modified, as set forth in Finding V, by which the United States had agreed that in consideration of the claimant releasing them "from all and every claim for loss or damage hitherto sustained by reason of any failure" on their part or "on account of any delay hitherto occasioned by" their action, and giving security against any loss on account thereof, they would pay or advance to it the sum of $234,830, said sum being the amount of the reservations of the first twenty-three installments which, under the terms of the original contract, were not payable until after the preliminary acceptance of the vessel.

On June 20, 1894, the installments as agreed upon had been paid to the claimant, who had executed the required release and given security against loss as aforesaid, but no demand for any refund of the sum so paid, or any part thereof, was ever made upon the claimant, nor was any objection or protest made by it to the release so required as a condition of such payment.

Subsequently, May 10, 1896, and in accordance with the sixth paragraph of the nineteenth clause of the contract, the balance of the money due, but which, pending the decision of the Secretary as to the cause of the delay, had been withheld, was paid to the claimant, who, without protest or objection, executed, as required by said paragraph and clause of the contract, a release as follows:

42 "The William Cramp & Sons Ship and Engine Building Company represented by me, Charles H. Cramp, president of said corporation, does hereby, for itself and its successors and assigns and its legal representatives, remise, release, and forever discharge the United States of and from all and all manner of debts, dues, sum and sums of money, accounts, reckonings, claims, and demands whatsoever, in law or in equity, for or by reason of, or on account of, the construction of said vessel under the contract aforesaid."

The vessel as stated was to have been completed within three years from the date of the contract, but was not completed or delivered until two years thereafter, or until November 19, 1895. In view of the penalties provided for in case of delay, as set forth in the ninth clause of the contract, it became important to determine the cause of such delay. That question, as required by the same clause of the contract, was submitted to the Secretary of the Navy, whose decision, as before stated, was that the two years' delay had been caused by the failure of the Government to furnish the materials in the order required as agreed upon. His decision under that clause of the contract, it was provided, "shall be conclusive and binding upon the parties."

The ruling of the Secretary, coupled with the corresponding extension of time for the completion of the vessel, operated to release the claimant

from the penalties otherwise provided for by the contract. But while this is conceded by the defendants, they contend that the Secretary had no authority over the question of the liability of the United States for damages for such delay. That is to say, when the Secretary decided that the delay was caused by the fault of the Government, and for that reason granted the claimant a corresponding extension of time, his authority under the contract was exhausted; that while by the terms of the contract all questions arising thereunder concerning deductions from the contract price of the vessel were to be submitted to the Secretary and his decision thereon was to be "conclusive and binding upon the parties," still he had no jurisdiction to consider or determine whether the cause of delay so decided by him would form the basis of liability for damages against the Government for breach of contract.

On the other hand, the claimant contends that as by the terms of the contract the Secretary was given exclusive jurisdiction to determine the cause of delay, and as he had decided that question in its favor, and thereby released it from the penalties provided for under the contract, the question was res judicata, and being res judicata, was conclusive on the Government in respect of the cause of delay, whether such delay be made the basis for damages for breach of contract or for the release of penalties thereby imposed.

But whether the decision of the Secretary in respect of the cause of delay be conclusive on the Government in this action for breach of contract we need not now decide, as the findings otherwise show that the delay was caused by the Government.

The more important question arising on the facts is as to the effect of the extension of the contract, and in this respect the defendants contend that when the Secretary extended the contract for the period equal to the delay caused by the Government, and thereby relieved the claimant from any penalties, it was thereby granted the full measure of relief contemplated by the contract.

43 That contention is based on the ninth clause of the contract, which, after reciting the various penalities to be imposed in case of the claimant's failure to complete the vessel within the contract time, and of the finality of the decision of the Secretary in respect to the cause of delay, provides:

"All delays which the Secretary of the Navy shall find to be properly attributable to the Navy Department, or to its authorized officers or agents, or any or either of them, and to have been a delay operating upon the final completion of the vessel within the time specified therefor in this contract, shall entitle the party of the first part to a corresponding extension of the period herein prescribed for the completion of the vessel."

In support of the contention arising under that provision of the contract the defendants cite the case of Haydnville Mining and Manufacturing Co. v. Art Institute (39 Fed. Rep., 484), which arose in the Circuit Court for the Northern District of Illinois. That was an action to recover a balance claimed to be due for extra work over and above that required by the contract. The contract in that case, among other things, provided that the plaintiff would do all the fireproofing work to be done on the building known as the Art Institute, in the city of Chicago, according to the drawings and specifications; and, further, that

should "delay be caused by other contractors to the positive hindrance of the contractor hereto, a just and proper amount of extra time shall be allowed by the architects, provided it shall have given written notice to said architects at the time of such hindrance or delay."

From the case it appears that the plaintiff was one of several contractors doing different portions of work on the same building, and that if he should be delayed in his work by the other contractors, then he should have a "just and proper amount of extra time" within which to complete his work.

In construing that provision of the contract the court said:

"Taking this clause of the contract and the specifications together, I construe them to mean this: That if the plaintiff was delayed by reason of the tardiness or want of dispatch on the part of the contractors doing the other classes of work upon the building, it should be entitled to such further time for the completion of the work as the architects should allow him; but I do not see that there is any provision that it is entitled to pecuniary damages by reason of said delay. Evidently the parties anticipated that this contractor, doing only a part of the work and that which was largely dependent upon the completion of other classes of the work by other contractors, must await the movements of these other contractors; and it seems to me that the stipulation for further time to complete the work in case of delay by other contractors implies that there is to be no pecuniary compensation for such delay."

The evident purpose of that provision of the contract, it seems to us, was to relieve both parties from any liability for delays caused by other contractors. That is to say, the plaintiff was not to be held responsible to the defendant for delays caused by other contractors, nor was the defendant to be held responsible to the plaintiff for such delays, both parties being equally blameless. In other words, as between the parties to the contract there was no breach, and hence no right of action accrued to either.

44 The defendants also cite the case of Richard v. Clark (88 New York Supplement, 242), decided at an appellate term of the Supreme Court of that State in May, 1904. The action arose under a contract to construct a model of the defendant's residence, alleging that damages had been sustained by reason of the delay of the defendant's architect to furnish within the proper time the plans of the building. The contract, among other things, provided that "should the contractor be obstructed or delayed in the prosecution or completion of his work by the act, neglect, delay, or default of the owner or the architect, or of any other contractor employed by the owner upon the work, or by any damage which may happen by fire, lightning, earthquake, or cyclone, or by the abandonment of the work by the employee through no fault of the contractor, then the time herein fixed for the completion of the work shall be extended for a period equivalent to the time lost by reason of any or all of the causes aforesaid." * * *

The court, in construing that provision of the contract, said: "Nor am I satisfied that any damages in the case are recoverable either for a delay or for extra work. The claim for delay was necessarily based upon the failure of defendant's architects to furnish the detail plans in time, as to which the contract provided that if the contractor 'be delayed in

the prosecution or completion of his work by the act, neglect, delay, or default of the owner or the architects,' etc., 'then the time herein fixed for the completion of the work shall be extended for a period equivalent to the time lost by reason of any or all the causes aforesaid.' The contract, therefore, explicitly contemplated a situation such as has here arisen, and the intention of the parties as evidenced by the agreement evidently was that the time clause affected plaintiff alone and that he might be absolved therefrom to the extent and in the manner provided in the contract."

In neither of the cases cited did the contract provide for a penalty for delay caused by the contractor; but in the case of Nelson v. Pickwick Associated Company (30 Appellate Court Ill., 333) the contract did provide for a penalty for delay. The provision respecting additional time for such delay was identical with that in the case of the Manufacturing Company v. The Art Institute, supra, and the court held that the granting of additional time for delay caused by other contractors did not preclude the recovery of damages resulting from such delay. The decision was based upon the theory that it was incumbent upon the one who was having the building erected to keep the work in such a state of forwardness as to enable the contractors to complete their respective work within the contract time.

That case differs from the present one in this, that there contracts had been entered into with various contractors to do certain portions of the work on the same building, while in the present case the claimant was the only contractor bound to do work on the vessel, though the Government was to furnish some of the materials therefor.

The claimant could have completed the vessel within the time agreed upon but for the default of the Government; and to hold that the granting of additional time for such default precludes the claimant from the recovery of damages, if otherwise entitled thereto, would, it seems to us, be reading into the contract a provision not in the minds of the parties when the contract was entered into.

45 From the language of the ninth clause of the contract it is evident that what was in the minds of the parties was that if, through the fault of the claimant, the vessel was not completed within the contract time, then the penalties by way of deduction from the contract price might be imposed; but if delayed by the fault of the Government, then additional equivalent time should be allowed, not in lieu of compensation for damages for such delay, but to enable the claimant to proceed to complete the vessel. But for that provision in the contract for additional time, the delay caused by the Government (the claimant having performed its part) would have discharged the claimant from further performance and left it with a right of action for damages on the obligation growing out of the breach. Or the claimant might have continued to perform, reserving to itself the right to sue for such damages as it may have sustained. On the other hand, as the claimant by the terms of the contract agreed that additional time should be allowed, equivalent to such delay, it thereby waived its right to terminate the contract for that cause; but the question of waiving its right to damages growing out of such delay was certainly not in the minds of the parties at the time the contract was entered into.

Nor was the granting of such additional time intended by the parties to operate as an estoppel against the claimant from seeking redress for damages it may have sustained by reason of the default of the Government. Certainty is an essential element in all estoppels, and the rule should not be applied unless the recitals in the contract are clear and conclusive against the claimant. Courts will not suffer a party to be deprived of a right without his consent, and such consent can not be inferred from the mere granting of additional time without any fault on the part of the claimant.

The claimant being without fault in the delay, no penalty could have been imposed upon it without gross error akin to fraud, from which relief would have been granted by the courts. The granting of such additional time was clearly for the benefit of the Government, as it thereby prevented the termination of the contract and saved it the expense of reletting the work to other contractors. Any other construction of the contract, it appears to us, might result in irreparable damage to the claimant, for if the Government is not to be held responsible in damages for its delay by reason of a corresponding extension of time, then it may delay the work indefinitely and exonerate itself by the mere granting of additional time in which to enable a contractor to complete his work.

But this objection, the defendants say, should have been considered by the claimant at the time of entering into the contract, and that if not satisfied therewith it could have declined to so contract. This would be true if the contract clearly so recited, or if the language used was susceptible of no other conclusion. We do not think the language used can be construed to exclude claims for damages arising out of such a breach; and if not, then the extension of time would not operate to deprive the claimant of its right to a recovery therefor.

Nor does the doctrine of expressio unius est exclusio alterius apply. That doctrine is not of universal application, and is always subject to the intention of the parties, evidenced by the contract.

It was not necessary to write into the contract that in case of breach the party injured should be entitled to redress for the damages
46 thereby sustained. That right accrued when the default took place, and it would be no answer to say that because additional time is provided for in the contract therefore no breach occurred, for the extension of time is dependent upon a breach—that is to say, delay caused by the Government in the prosecution of the work.

On this branch of the case, therefore, we reach the conclusion that a corresponding extension of time for the delay caused by the Government was not intended by the parties to conclude the claimant or deprive it of the right to maintain an action for any damages it may have sustained by reason of such delay.

The defendants further contend that the final release set forth in Finding VI was intended by the parties as a full and final discharge of the United States from any and all claims of whatever character growing out of the construction of the vessel under the contract.

That contention is based on the sixth paragraph of clause 19 of the contract, which reads:

"When all the conditions, covenants, and provisions of this contract shall have been performed and fulfilled by and on the part of the party

of the first part, said party of the first part shall be entitled, within ten days after the filing and acceptance of its claim, to receive the said 'special reserve,' or the surplus, if any, of the said 'reserve fund,' or so much of either as it may be entitled to, on the execution of a final release to the United States, in such form as shall be approved by the Secretary of the Navy, of all claims of any kind or description under or by virtue of this contract."

The release which was signed by the claimant May 18, 1896, under that provision of the contract is as follows:

"The William Cramp & Sons Ship and Engine Building Company, represented by me, Charles H. Cramp, president of said corporation, does hereby, for itself and its successors and assigns, and its legal representatives, remise, release, and forever discharge the United States of and from all and all manner of debts, dues, sum and sums of money, accounts, reckonings, claims, and demands whatsoever, in law or in equity, for or by reason of, or on account of, the construction of said vessel under the contract aforesaid."

In support of their contention the defendants cite the case of Coulter v. Board of Education, etc. (63 N. Y., 365). That case arose under a contract to do the carpenter work on a school building in the city of New York. The contract, among other things, provided in substance that the last payment thereunder should not be made until a certificate had been filed by the contractor to the effect that all claims and demands for extra work or otherwise under or in connection with the contract had been presented to the board of education and the amount to be paid therefor agreed upon, and that such last payment was to be in full of every claim or demand whatsoever in the premises, except the amount agreed upon for extra work.

The contractor was delayed in the prosecution of his work by the contractor doing the mason work. After the expiration of the time and during such delay the price of labor and materials advanced so that the cost of completing the carpenter work was materially increased. For this increased cost the contractor brought suit, but in the certificate which he had previously filed he had omitted to include this item.

47 On the facts stated the court said:

"A material question is, whether the certificate, given by the plaintiff upon receiving the last payment, precludes him from recovering the damages claimed in the complaint. It is quite clear that the certificate alone, regarded as a release or receipt, would not have that effect. It does not in terms release such damages, and the general words employed would, within established principles, be limited to the items specified. (1 Edw. Ch., 34; 1 Cow., 122, and cases there cited.) But the certificate, taken in connection with the contract, presents a different question. * * * By this provision the parties evidently contemplated that all claims arising out of or in consequence of the contract should be presented and liquidated before the final payment was made. If the plaintiff had declined to give the certificate he could not have enforced the payment. By giving the certificate he induced the defendent to make the payment, and is, I think, precluded from afterwards setting up other claims. Under the agreement the certificate amounts to a waiver of other demands. The language of the contract is broad and comprehensive, 'that such

payment is in full of every claim or demand whatever in the premises,' whether for extra work or otherwise. It must be borne in mind that this language was used in advance, and we must give it effect according to the intent of the parties, and it seems most rational to suppose that when the certificate was given and the last payment made, together with the amount of other claims, which had been liquidated, they designed that the transaction should be closed. Parties have a right to make contracts for themselves, and it is the duty of courts to enforce them as made, even though a hardship may be worked. Fraud or mistake may entitle a party to relief, but if neither of these elements exists the contract must be carried out according to its terms. We think the plaintiffs were required to present this claim and make an effort to have it adjusted according to the contract; failing in that, they had the option to bring an action or sign the certificate and waive the claim."

That case is quite different from the present one. There the contractor was required before receiving the last payment to file a certificate setting forth "all his claims and demands for extra work or otherwise under or in connection with the contract," and as he failed to set forth any claim for damages growing out of the increased cost of labor and materials during the period of delay he thereby concluded himself from thereafter asserting such claim.

Here the provision of the contract is that "when all the conditions, covenants, and provisions of this contract shall have been performed or fulfilled" by the contractor, then it "shall be entitled, within ten days after the filing and acceptance of its claim, to receive the 'special reservation,' or the surplus, if any, of the said 'reserve fund,' or so much of either as it may be entitled to, on the execution of a final release to the United States, in such form as shall be approved by the Secretary of the Navy, of all claims of any kind or description under or by virtue of this contract."

The final payment was made dependent upon the performance by the claimant of all the conditions, covenants, and provisions of the contract,
and those it had performed, and therefore upon the presentation of
48 its claim therefor it was, under the terms of the contract, entitled
to final payment, upon the execution of a release as therein provided.

But while the form of the release was subject to the approval of the Secretary his act is qualified by the words "of all claims of any kind or description under and by virtue of this contract," and therefore unless the claim for damages growing out of the delay caused by the Government was embraced in the language "all claims of any kind and description under or by virtue of this contract," then such claim was not embraced in the release.

Whatever damages the claimant suffered grew out of the breach by the Government and not by the claimant in its performance and fulfillment of the "conditions, covenants, and provisions" of the contract. The claim, therefore, having arisen out of such breach was not the subject of release contemplated by the contract, nor was it embraced in the final release. The receipt given by plaintiff did not include the release of claims not considered. This question was before the court upon a receipt in almost the exact form arising upon a claim growing out of delays on the part of the Government in supplying material, and the court there

held that it was no bar to the suit. Pneumatic Gun-Carriage Co., 36 C. Cls. R., 71. In our view of the case the question respecting the power and authority of the Secretary of the Navy to settle an unliquidated claim does not arise.

The case of Phelan v. Mayor, etc. (119 N. Y. R., 86, 90), is also cited in support of the defendants' contention. That case arose under a contract for grading a street. The contract in substance provided that the work should be completed in 320 days, and in case of failure so to do the contractor was to pay the wages of inspectors for the excess of time employed in the work. In computing the time the contract provided in substance that the total time during which the work of completing the contract is delayed by the defendants—such time to be determined and certified by the commissioner of public works—should be excluded.

The work not having been completed within the contract time, the defendants retained the inspectors' fee for the extra time. The suit was brought to recover the amount so retained, the contractor claiming that the delay in excess of 320 days was caused by the defendants leaving obstructions in the street. In construing the contract the court, among other things, said: "There was no determination by the commissioner of public works applied for or made under the provision. The inspectors' fees were a proper charge under another provision of the contract, unless, according to the provision quoted, the delay was occasioned by the act or omission of the city. But by the terms of this clause it was a condition precedent to any right of the plaintiff, to be relieved from the allowance of inspectors' fees, that the matter should have been submitted to and determined by the commissioner of public works, and this was not done. It was a lawful provision, and is an answer to the claim in the first count of the complaint. If the commissioner had neglected or refused to act when called upon to do so, a different question would be presented."

The analogy between that and the present case is hardly perceptible. There no determination by the commissioner of public works was applied for or made, and as such determination was made a condition precedent to the contractor's right to be relieved from the expense of
49 inspectors' fees, no recovery could be had therefor. The logical result of that decision is that if the contractor had applied for said determination he would have been allowed to recover.

In the present case the claimant was, when it had performed and fulfilled "all the conditions, covenants, and provisions" of the "contract," entitled "within ten days after the filing and acceptance of its claim, to receive" final payment, upon the execution of a release to the United States "of all claims of any kind or description under or by virtue of this contract."

As no damages grew out of the performance of the contract by the claimant, no claim was predicated thereon; and as the contract does not provide for the release of claims for damages arising out of a breach by the Government, the signing of the final release does not, for the reasons above stated, conclude the claimant from a recovery, if otherwise entitled,

The defendants further contend that by signing the release of May 10. 1894, referred to in Finding V, the claimant thereby concluded itself as to all claims for damages for delay caused by the Government prior thereto. On the other hand, the claimant contends that at the time of

the execution of said release it had been delayed by the Government in the performance of its contract, thereby preventing it from receiving the payments it would have received but for such delay; and further, that the Secretary of the Navy had no authority or jurisdiction to settle the claim for damages growing out of a breach of contract, and that therefore the release respecting the claim for damages was without consideration.

At the time stated the cause of the delay had not been decided by the Secretary, though the time for the completion of the vessel had expired nearly six months before.

The claimant, in order to receive certain payments in advance of the preliminary acceptance of the vessel, entered into the modification of the contract, made a part of the petition, and referred to in Finding V, whereby the contract was modified.

The cost of the vessel was three million and sixty-three thousand dollars ($3,063,000), to be paid in "thirty equal installments, as the work progresses, with the reservation of ten per cent from each payment."

The tenth clause of the contract provides for a preliminary trial trip "to test the hull and fittings, the machinery, including engines, boilers, and appurtenances, the equipment, and the speed of the vessel, and that such vessel shall be accepted only on fulfillment and subject to the conditions and agreements hereinafter set forth." Then follow the conditions, among which is the guarantee by the claimant that the speed "shall be not less than an average of fifteen (15) knots per hour, maintained successfully for four (4) consecutive hours," etc.

The eleventh clause of the contract provides, in substance, that if upon such trial trip the requirements relating to the hull, machinery, and the fitting and securing of her armor shall be fulfilled and the speed of fifteen knots guaranteed as aforesaid shall be developed and maintained, "then and in such case the vessel shall be preliminarily accepted and payment of the last three installments of the contract price of the vessel and of all reservations shall be made, subject, however, to a special reserve of sixty thousand dollars ($60,000) from and out of the reservation hereinafter provided for; but if the speed developed and maintained by said vessel during such trial shall fall below the speed (15 knots) guaranteed as aforesaid she shall be conditionally accepted, subject to deductions, as aforesaid, from the contract price of the vessel on account of her failure to reach the speed (15 knots) guaranteed as aforesaid," provided the conditions relating to the hull, machinery, and fittings of the armor shall have been fulfilled.

In case of such conditional acceptance it is therein provided that the twenty-eighth, twenty-ninth, and thirtieth installments of the contract and the reservation of payments under the contract "shall constitute a reserve fund which shall be applicable to or toward the satisfaction of such deductions from the contract price," to be retained by the Government for that purpose.

The further provision of that clause is that "in case of a preliminary acceptance of the vessel the said special reserve of sixty thousand dollars ($60,000), or in case of a conditional acceptance of said vessel, the said reserve fund, or so much thereof as may, in the judgment of the Secretary of the Navy, be necessary, shall be held until the vessel has been

finally tried after being fully equipped, armed (or weighted correspondingly), and in all respects complete and ready for sea under conditions prescribed or approved by the Secretary of the Navy: Provided, That such final trial shall take place within five months from and after the date of the preliminary or conditional acceptance of the vessel."

Then follow the provisions to the effect that if, upon such final trial, or if not then taken place, any time within five month after the preliminary or conditional acceptance, any weakness or defect in the hull, fitting, or equipment, due to defective workmanship or defective materials, or in the placing and securing of the armor, due to defective workmanship, develops, the same shall, at the expense of the claimant, be corrected and repaired to the satisfaction of the Secretary of the Navy.

At the time of the execution of the modification of the contract, and of the release hereinbefore referred to, the vessel had not been sufficiently advanced to put her upon her trial trip to test her hull, machinery, and speed, and the placing of the armor as aforesaid, and therefore the vessel had not been preliminarily accepted.

We have thus referred at length to the provisions of the contract respecting the trial trip of the vessel to test her hull, machinery, speed, and the placing of her armor, coupled with the condition of the vessel respecting the work then done, in order to get more clearly before us the force and intended effect of the modification or amendment of May 10, 1894, in conformity with which the release referred to was executed.

Under the conditions stated, the contract was modified to the effect that in lieu of the payment of the last three installments and of the amount reserved from the previous payments "only after a trial trip and a preliminary or a conditional acceptance of the vessel," there should be paid to the claimant" so much of the aggregate amount of the last three installments of the contract price and of the amount of the reservations from previous payments as will leave in the hands of the party of the second part an amount sufficient, in the judgment of the Secretary of the Navy, to cover the special reserve of sixty thousand dollars ($60,000) provided for in the eleventh clause of the contract, the cost of all
51 unfinished work and all deductions likely to be made on account of deficiencies in speed and all contingencies that are liable to arise.

"But such payment shall not be made until the party of the first part has given bond with approved security conditioned for the return to the party of the second part of the amount so paid, upon demand being made by the Secretary of the Navy therefor, for indemnity of the party of the second part against loss or injury by reason of such payment, and in consideration of such advance payment the party of the first part hereby releases the party of the second part from all and every claim for loss or damage hitherto sustained by reason of any failure on the part of the party of the second part to comply with its contract or on account of any delay hitherto occasioned by the action of said party of the second part."

In conformity with the modification the claimant was paid $234,830, for which it executed the release and gave the required bond. The security exacted was to indemnify the Government against "loss or injury by reason of such payment." That is to say, if upon the trial trip

the speed of the vessel should fall below 15 knots per hour and for that reason be conditionally accepted, deductions were to be made from the contract price of the vessel as provided in the eleventh clause of the contract; and to that end the sum paid was to be restored to the reserve fund and applied to the satisfaction of such deduction.

As before stated, at the time of the modification of the contract and the payment of the money thereunder the question of responsibility for the delay had not been determined nor was such delay at the time conceded to have been caused by the Government, as no extension of time had then been granted by it, and as the vessel had not been preliminarily accepted nor the work thereon sufficiently advanced to determine whether the materials and workmanship were in conformity with the contract, we think the modified contract and the payment of money thereunder was supported by sufficient consideration, and further, that the modification of the contract as made was within the authority of the Secretary of the Navy.

By virtue of the modification the Government parted with the money it might otherwise have kept until the vessel had been preliminarily accepted, and it is no answer to say that but for the delay caused by the Government up to that time the vessel would have been preliminarily accepted or that the materials and workmanship would have been in all respects in conformity with the contract.

The claimant executed the modified contract and the release thereunder required without protest or objection, and by the execution of the bond indemnifying the Government "against loss or injury by reason of such payment" it thereby conceded that the money was not then due, even though the delay up to that time had been caused by the Government.

Again, it is a familiar principle of law that one who accepts the terms of a contract in part must accept the contract as a whole. The claimant accepted the money under the contract before it was in fact due, and in consideration thereof executed the release whereby it released the Government "from all and every claim for loss or damage hitherto sustained by reason of any failure" on the part of the Government "to comply with its contract or on account of any delay hitherto occasioned" by it.

52 It is insisted that the court can give no force or effect to that release, though authorized by the modified contract, because the modification itself was without consideration in this that but for the delay caused by the Government the vessel would have been sufficiently advanced toward completion to entitle the claimant to receive the money it did receive; and that in so far as the modified contract seeks to release the Government from loss or damage caused by such delay, the Secretary of the Navy was acting outside of his powers.

We have endeavored to show that under the circumstances of this case the modified contract was supported by sufficient consideration and that the claimant, having accepted the contract in part, is bound to accept it as a whole.

At that time no claim for loss or damage resulting from delay caused by the Government had been presented to the Secretary of the Navy, nor was any such claim asserted when the modified contract was entered into, hence the provision of the contract requiring a release "from all and

every claim for loss or damage hitherto sustained" by reason of any delay caused by the Government must be treated as a precautionary measure by the Secretary to prevent the claimant from thereafter asserting such claim. Such provisions are common, especially in the modification of contracts where one party seeks to obtain a benefit thereunder in advance of the time specified therefor in the contract, and it would not do to say that such precautionary measures by executive officers are not within their jurisdiction or that such contracts are in their nature the settlement of unliquidated claims.

Clearly the purpose of that provision of the contract was that in consideration of the money paid the claimant would not thereafter assert any claim from which it had released the Government, and this the claimant was bound to know.

Having accepted a part of the contract, the question, therefore, is not whether the Secretary of the Navy had authority to settle such claim, but whether the claimant is not bound to accept the contract as a whole. The recitals therein are clear and particular, and we must hold that the claimant, for the reasons stated, is estopped from now asserting any claim for loss or damage resulting from delay prior to May 10, 1894, though it was subsequently decided by the Secretary of the Navy that the delay for the whole period of two years had been caused by the Government. While we are not free from doubt on this branch of the case because of that decision, still, as the whole matter was within the breast of the claimant and its officers at the time it executed, without protest or objection, the modified contract and release, we are inclined to hold claimant to the contract it entered into and on the faith of which the Government at the time parted with the money.

This brings us to the items of damage caused by the delay. We have found and set out the damage for the two years' delay and then apportioned it for the period subsequent to May 10, 1894; that is to say, we have found the actual or compensatory damages resulting immediately from the acts of the Government. As the claimant was permitted to complete the contract, no question of profits or gains prevented is involved.

Respecting the expense growing out of the purchase of additional ground, as set forth in Finding VII, it is sufficient to say it is not
53 shown that the purchase of the real estate and the improvements thereon were necessary to the construction of the "Indiana," nor that any portion of said outlay was attributable to the vessel. It was incumbent upon the claimant under the contract to provide at its own expense the yard and ground, shops, machinery, tools, and appliances necessary to enable it to perform the contract.

We have, however, in Finding VIII, found the reasonable value of the use of the yard, including said real estate, machinery, tools, superintendence, and general upkeep of the yard equitably chargeable to the "Indiana" during the period of delay, at $3,000 per month, or for the period of delay subsequent to November 10, 1894, at $54,887.67. Similar items were allowed in the case of Myerle (31 C. Cls. R., 105–120), while in the McKay case (27 C. Cls. R., 422) they were disallowed for the reason, stated in the Myerle case (page 137), that "those cases came to this court under special acts containing provisions peculiar to them as to

the measure of damage, whereas this case must be determined by the general rules of law applicable to such cases." So in the present case the damages must be determined by the general rules of applicable law.

In Finding IX we have found the reasonable cost for the care and protection of the vessel during the period of delay, including the cleaning of the bottom, furnishing material and painting (except the last or final coat), electric lighting, keeping up steam to prevent valves from leaking, and every other expense connected therewith for the whole period of delay to be $48,000, and for the period from May 10, 1894, $36,591.78, all of which items of expense we find were reasonable and necessary to the care and protection of the vessel.

Regarding the expense for wharfage set forth in Finding X we are not free from doubt, as the claimant was not a wharfinger, and allowance has been made for the use of the yard, but as the ordinary wharfage at the port of Philadelphia for merchant vessels is found to have been 1 cent per net registered ton during the period of delay, we have, in the absence of any contract, concluded to allow that rate in the present case as reasonable. (Ex parte Easton, 95 U. S. R., 68–73.) The net registered tonnage of the "Indiana," we find, was 3,203.58, and at the rate stated would be $32 a day, or $23,360 for the whole period of delay, and for the period subsequent to May 10, 1894, $17,808, which sum includes the dredging of the basin in which to accommodate the vessel, and also the expense of watchmen; that is to say, wharfage being allowed, the claimant must be regarded as a wharfinger to that extent and therefore chargeable as a bailee for hire with ordinary care. Upon that theory we have made the allowance, in which is included the expense of watchmen.

No allowance is made for the tug service in the removal of the vessel from time to time for the reason that the Government, being charged with continuous wharfage during the period of delay, any removal of the vessel that took place during that period must be held to have been for the benefit of the claimant and not for the benefit of the Government.

Respecting the claim for $34,463.55 for insurance on the vessel during the whole period of delay, or for $26,272.55 for the delay subsequent to May 10, 1894, we find that to have been the reasonable amount paid out by the claimant during that period, and we therefore allow the same.

54 The last item of damage is $17,514.94, for expense incurred in preparing the vessel for her trial trip. This expense has no connection whatever with the delay caused by the Government in failing to furnish the armor.

In March, 1894, the claimant, assuming that the work on the vessel had reached a stage of completion entitling her to a trial trip, so notified the Secretary of the Navy, and that officer called the claimant's attention to the tenth clause of the contract, respecting the payment of the expense therefor by the Government in case such trial should be successful, and, without otherwise approving the proposed trial of the vessel, directed certain naval officers to inquire into such expense and see if the same was reasonable. They verified the same and found no objection to the amount thereof.

The claimant, in proposing the trial trip it did, seems to have acted upon the theory that because other vessels built by it for the United States had been sent on trial trips before their completion, therefore the

"Indiana," with only eight-tenths of her hull and equipment completed and half of the armor fitted, was also subject to such trial trip.

The tenth clause of the contract provides that "when the vessel is completed and ready for delivery to the United States, as required by the drawings, plans, and specifications, she shall be subjected to a trial trip, in the open sea, under conditions prescribed or approved by the Secretary of the Navy, to test the work and fittings, machinery, including engines, boilers, and appurtenances, the equipment and the speed of the vessel, and that such vessel shall be accepted only on fulfillment of, and subject to, the conditions and agreements hereinafter set forth." Then follows the statement of the conditions as to the working of the machinery, the speed developed and maintained, materials and workmanship of the hull, fittings, machinery, etc. And by the eleventh clause of the contract it is provided that if the vessel and her equipment and the fitting of her armor shall meet the requirements, and the speed of 15 knots guaranteed shall be developed and maintained, then and in such case the vessel shall be preliminarily accepted. But manifestly the vessel was not then in condition for such trial trip.

It may be that the claimant suffered loss because the Secretary directed the verification of the expenses incident to the preparation of the vessel for trial, but it was bound to know whether under the contract the vessel was in readiness for such trial trip, and therefore it can not be held that it was misled by the action of the Secretary, even if his act in directing the verification of the expense so incurred should be regarded as giving his tacit assent to such trial.

It is well settled, both by this court and the Supreme Court, that the Government can not be held liable for the promises and acts of its officers and agents unless made and done pursuant to law. Leonard's case (18 C. Cls. R., 382); Allen's case (28 id., 141–146); Whiteside et al. v. United States (93 U. S. R., 247–257), wherein, respecting the rules that should govern in such cases, the court in the last case said:

"Different rules prevail in respect to the acts and declarations of public agents from those which ordinarily govern in the case of mere private agents. Principles, in the latter category, are in many cases bound by the acts and declarations of their agents, even where the act or declaration was done or made without any authority, if it appear that the act was done or declaration was made by the agent in the course of his regular employment; but the Government or public authority is not bound in such a case, unless it manifestly appears that the agent was acting within the scope of his authority, or that he had been held out as having authority to do the act, or was employed in his capacity as a public agent to do the act or make the declaration for the Government. Story's Agency (6th ed.), sec. 307a; Lee v. Munroe, 7 Cranch, 376."

But we need not rest the case on that theory, for while the act of the Secretary may in fact have been relied upon as his assent to such trial trip, still the claimant can found no right thereon for a recovery in the case, because it was bound to know that under the terms of the contract the offer of the vessel for trial at that time was premature.

The result of our investigation of the whole case is that the laimant is entitled to recover for the loss it sustained by reason of the delay of

the Government to furnish the armor for the period subsequent to May 10, 1894, being for one year six months and nine days, as set forth in Finding XIII, the sum of $135,560.

Barney, J., had not been appointed when this case was tried, and took no part in the decision.

56 V.—*Judgment of the court.*

THE WILLIAM CRAMP AND SONS SHIP AND Engine Building Company *vs.* THE UNITED STATES. } No. 20858.

At a Court of Claims held in the city of Washington on the 29th day of January, 1906, judgment was ordered to be entered as follows:

The court, on due consideration of the premises, find for the claimants, and do order, adjudge, and decree that the said The William Cramp and Sons Ship and Engine Building Company have and recover of and from the United States the sum of one hundred and thirty-five thousand five hundred and sixty dollars ($135,560.00).

BY THE COURT.

57 VI.—*Application for and allowance of appeal.*

In the Court of Claims of the United States. Dec. term, 1905.

THE WILLIAM CRAMP AND SONS SHIP AND Engine Building Co. *vs.* THE UNITED STATES. } No. 20858.

From the judgment rendered in the above-entitled cause on the 29th day of January, 1906, in favor of claimant, the defendants, by their Attorney-General, on the 3d day of April, 1906, make application for and give notice of an appeal to the Supreme Court of the United States.

J. A. VAN ORSDEL,
[J. Q. T.] *Assistant Attorney-General.*

Filed April 3, 1906.

Ordered that the appeal in the above-entitled cause be allowed as prayed for.

BY THE COURT.

APRIL 3, 1906.

58 In the Court of Claims.

THE WILLIAM CRAMP AND SONS SHIP AND Engine Building Company *vs.* THE UNITED STATES. } No. 20858.

I, John Randolph, assistant clerk of the Court of Claims, hereby certify that the foregoing are true transcripts of the pleadings in the above-

entitled cause, of the findings of fact and conclusion of law filed by the court, of the opinion of the court, of the judgment of the court, of the application for and allowance of appeal to the Supreme Court of the United States.

In testimony whereof I have hereunto set my hand and affixed the seal of said Court of Claims this 13th day of April, A. D. 1906.

[SEAL.] JOHN RANDOLPH,
Asst. Clerk Court of Claims.

59 In the Court of Claims. Term 1905–1906.

WILLIAM CRAMP AND SONS SHIP AND Engine Building Company
vs.
THE UNITED STATES. } No. 20858.

From the judgment rendered in the above-entitled cause on the 29th day of January, 1906, the claimants, by their attorney, John C. Fay, on the 16th day of April, 1906, make application for and give notice of appeal to the Supreme Court of the United States.

JOHN C. FAY,
Attorney for Claimant.

Filed in open court April 16, 1906, and it was thereupon ordered

That the appeal be allowed as prayed for, and that the same may be annexed to and form part of the record in said cause as certified to said Supreme Court on the 13th day of April, 1906.

In testimony whereof I have hereunto set my hand and affixed the seal of said Court of Claims this 17th day of April, A. D. 1906.

[SEAL.] JOHN RANDOLPH,
Asst. Clerk Court of Claims.

60 (Indorsement on cover:) File No. 20210. Court of Claims. Term No. 263. The United States, appellant, *vs.* The William Cramp & Sons Ship and Engine Building Company. File No. 20211. Term No. 264. The William Cramp & Sons Ship and Engine Building Company, appellant, *vs.* The United States. Filed April 20, 1906. File Nos. 20210 and 20211.

O

FILE COPY.

The Supreme Court, U. S.
FILED
MAR 16 1907
JAMES H. McKENNEY,
Clerk.

No. 263.

In the Supreme Court of the United States.

OCTOBER TERM, 1906.

THE UNITED STATES, APPELLANT,
v.
THE WILLIAM CRAMP AND SONS SHIP AND ENGINE BUILDING COMPANY.

APPEAL FROM THE COURT OF CLAIMS.

BRIEF FOR THE UNITED STATES.

CHARLES J. BONAPARTE,
Attorney-General.

CHARLES C. BURNETT,
Special Attorney.

J. A. VAN ORSDEL,
Assistant Attorney-General.

In the Supreme Court of the United States.

OCTOBER TERM, 1906.

THE UNITED STATES, APPELLANT,
v.
THE WILLIAM CRAMP AND SONS SHIP AND ENGINE BUILDING COMPANY. } No. 263.

APPEAL FROM THE COURT OF CLAIMS.

BRIEF FOR THE UNITED STATES.[a]

STATEMENT OF THE CASE.

The naval appropriation act of June 30, 1890 (26 Stats., 189, 205), provided:

> That for the purpose of further increasing the naval establishment of the United States the President is hereby authorized to have constructed by contract three sea-going coast-line battle ships designed to carry the heaviest armor and most powerful ordnance upon a displacement of about eight thousand five hundred tons, with a coal endurance of

[a] A brief on the cross-appeal of the Cramp company will be submitted separately.

> about five thousand knots on the total coal capacity at the most economical rate of speed, and to have the highest practicable speed for vessels of their class, to cost, exclusive of armament and of any premiums that may be paid for increased speed, not exceeding four million dollars each.

Under this authority, on November 19, 1890, the United States, by the Secretary of the Navy, contracted with the William Cramp & Sons Ship and Engine Building Company for the construction of a battle ship, the first to be built in this country, known at first as "*No. 1*," and afterwards called the *Indiana*, at a cost of $3,063,000. The contract contained, *inter alia*, the following provisions:

The Cramp Company was to "furnish all the armor, armor bolts and their accessories, and all the labor and material required in the construction of the protective deck," and the United States was to "furnish all other armor, armor bolts and their accessories, to be used in the construction of the vessel, including such as may be required in the construction of the belt, turrets, redoubts [as planned and constructed the vessel had no armor designated as 'redoubt'], barbettes, conning tower, gun shields, ammunition tubes, and in the protection of the guns and loading positions, * * * and deliver said armor, armor bolts and their accessories * * * within the times and in the order required to carry on the work properly." (Rec., 7.)

The Cramp Company was to put the armor in place, and build and equip the vessel in other respects, and deliver it complete in three years from the date of the contract, subject to a deduction of $75 per day from the contract price for the first three months of delay, $150 per day for the second three months of delay, and $200 per day for all delays over six months. (Rec., 9.)

The deductions were only to be made for delays which "shall not have been caused by the act of the United States, or by fire or water, or by any strike or stand out of workmen employed in the construction of the hull, machinery, fittings, or equipment," or in the fitting or securing the armor, "or by other circumstances beyond the control" of the Cramp Company. (Rec., 9–10.)

All delays which the Secretary of the Navy should "find to be properly attributable to the Navy Department, or to its authorized officers or agents, or any or either of them, and to have been a delay operating upon the final completion of the vessel within the time specified therefor," should entitle the Cramp Company "to a corresponding extension of the period herein prescribed for the completion of the vessel." (Rec., 10.)

The hull, machinery, fittings, and equipment of the vessel, and all materials and appliances provided for her construction, were to be kept fully insured, the insurance to be renewed and increased from time to time by the Cramp Company and at

its cost, the loss being payable to the United States. (Rec., 9.)

If upon the completion of the vessel as required by the contract, except as to "the armor for her side belt, casemate, turrets, redoubts, barbettes, and conning tower," the United States should not have commenced the delivery of such armor, the vessel should be subjected to a trial trip, and if upon such trial all the conditions of the contract, except as to such armor, should be fulfilled, the vessel should be preliminarily accepted; and if within five months after such preliminary acceptance the United States should not have commenced the delivery of such armor, the vessel should be finally accepted and the cost of putting the armor in place should be ascertained and deducted from the contract price; but if before the final trial, or within five months after preliminary acceptance, the United States should "commence and continue with reasonable diligence" the delivery of such armor, the Cramp Company should put it in place in accordance with the contract. (Rec., 7–8.)

Payment was to be made in thirty equal installments, as the work progressed, with a reservation of 10 per cent from each installment. The last three installments, as well as the reservations from the first 27, were not to be paid until preliminary acceptance, and to provide for possible defects a special reserve of $60,000 was to be retained by the United States until final acceptance of the vessel. (Rec., 11–12, 15.)

When the Cramp Company had fully performed its part of the contract it was to receive the special reserve, or so much of it as might be left, "on the execution of a final release to the United States, in such form as shall be approved by the Secretary of the Navy, of all claims of any kind or description under or by virtue of this contract." (Rec., 15.)

The United States obtained the armor from other contractors, who failed to complete the manufacture thereof in time for delivery to the Cramp Company as the contract provided, and in consequence of this the completion of the vessel was delayed two years beyond the contract period. Accordingly the Secretary of the Navy extended the time for completion by two years, i. e., until November 19, 1895, the date of acceptance of the vessel. On receipt of the final payment, the Cramp Company executed a full release to the United States "of and from all and all manner of debts, dues, sum and sums of money, accounts, reckonings, claims, and demands whatsoever, in law or in equity, for or by reason of, or on account of, the construction of said vessel under the contract aforesaid." This release appears to have been given without objection or protest. (Rec., 18, 19–20.)

More than twenty months before the completion of the vessel, viz, early in March, 1894, the Cramp Company wished to have the vessel make a trial trip in her then condition, but the Secretary

of the Navy ultimately refused. (Rec., 22.) The diagonal armor, casemate armor, conning-tower tube, and barbette armor had been already delivered, and the sponson armor was then being delivered. (Rec., 18.) On May 10, 1894, the parties executed an agreement whereby the United States agreed to pay so much of the last three installments of the contract price and of the reservations from previous payments as would leave enough, in the judgment of the Secretary of the Navy, to cover the cost of all unfinished work and all contingencies, and the Cramp Company was to give bond to refund the money so paid, if called upon to do so. In consideration of the payment so made, the Cramp Company released the United States "from all and every claim for loss or damage hitherto sustained by reason of any failure on the part of the [United States] to comply with its contract, or on account of any delay hitherto occasioned by the action of [the United States]." Under this agreement the Cramp Company was paid $234,830, being the amount of the reservations of the first twenty-three installments, and it was never called upon to refund any of the money so paid. (Rec., 19.)

On August 10, 1897, the Cramp Company filed its petition in this case, claiming damages on account of the delay in furnishing the armor (Rec., 1), and on January 29, 1906, the court gave judgment for the damages which it found had accrued since May 10 1904, when the release was given

as to damages for delays occurring before that date. It found the following amounts as damages:

The reasonable value for the use of the claimant's yard, machinery and tools, and for superintendence in the construction of the vessel, including the general upkeep of the yard chargeable to the *Indiana*, $3,000 per month, making	$54,887.67
The reasonable cost of the proper care and protection of the vessel during the two years' delay, including expense of cleaning the bottom, furnishing material and painting, temporary awnings and tents over caps left for the introduction of turrets, additional scaling to remove rust before painting, electric lighting, keeping up steam to prevent freezing of valves, wetting down decks, going over machinery, and keeping vessel free from snow, dust, ice, and débris, from May 10, 1894	36,591.78
Wharfage from May 10, 1894, including the dredging of a basin to accommodate the vessel	17,808.00
The proportionate expense, for the period from May 10, 1894, of the cost of insurance during the two years' delay	26,272.55
	135,560.00

(Rec., 21, 22, 23.)

If the United States had been held liable for damages accruing during the whole period of delay the total of the above items would have been $177,823.55.

The court below further found that after the Cramp Company had expressed its wish for a trial trip early in March, 1894, as already stated above, the Secretary of the Navy wrote that "in view of the fact that the trial of the *Indiana* will take place at an early date," the Cramp Company should confer with two designated officers of the Navy as to the expenses incurred in preparing for the trial trip. These expenses, which were verified by the officers, amounted to $17,514.94, which amount was

reasonable. A board of officers reported that as the vessel was not yet completed a trial trip would not be for the interest of the Government, and accordingly the Secretary refused to allow it to be made. The court below made no allowance on account of this item. (Rec. 22, 36, 37.)

Whereupon the United States took this appeal on April 3, 1906, and on April 16, 1906, the Cramp Company took a cross appeal. (Rec., 38, 39.)

ASSIGNMENTS OF ERROR.

The court below erred:

(1) In holding that the extension of the time for the completion of the vessel, made under the ninth clause of the contract, did not prevent the United States from being liable for damages on account of delay in delivering the armor.

(2) In holding that the final release, executed May 18, 1896, did not release the United States from liability for damages on account of delay in delivering the armor.

(3) In holding that the United States was liable for wharfage for the *Indiana* during the period when she remained at the Cramp Company's shipbuilding yard after the expiration of the contract time for the completion, although the Cramp Company was not a wharfinger, and damages have been allowed for the use of its yard.

(4) In holding the United States liable for a portion of the cost of insurance of the vessel during

the two years' delay, in proportion to the time after May 10, 1894, instead of holding it liable for the actual net amount paid by the Cramp Company for insurance after May 10, 1894, less the amount which it saved on account of having to maintain a less amount of insurance during the original contract term than if the vessel had been completed within that term.

(5) In entering judgment for the Cramp Company in the sum of $135,560.

BRIEF OF ARGUMENT.

QUESTIONS RAISED BY THE APPEAL OF THE UNITED STATES.

I.

As to the First Assignment of Error.

THE EXTENSION OF TIME FOR COMPLETION, AS PROVIDED FOR IN THE CONTRACT, WAS INTENDED TO OBVIATE THE EFFECT OF ANY DELAYS ATTRIBUTABLE TO THE NAVY DEPARTMENT, OR ITS AGENTS, SO THAT, WHEN THIS EXTENSION WAS MADE, THE CONTRACT BECAME IN EFFECT A CONTRACT FOR COMPLETION IN FIVE YEARS, AND NO DELAY COULD BE CHARGED TO HAVE OCCURRED.

It is self-evident that if the performance of any contract between two parties be delayed, the delay must be attributable either to one party or to the other party, or to neither party. Now, if the provisions of the ninth clause of the contract (Rec., 9–10) be carefully studied, it will be seen that these

three classes of delay have been recognized and provided for, different consequences being attached in the case of each class.

1. In the case of delays caused by circumstances within the contractor's control—i. e., delays attributable to the contractor, penalties were imposed.

2. In the case of delays attributable to neither party no penalties were imposed. These are the delays which were described as caused "by fire or water, or by any strike or stand out of workmen employed in the construction of the hull, machinery, fittings, or equipment of said vessel, or in the fitting, placing, and securing of her armor, or by other circumstances beyond the control of the party of the first part"—i. e., the contractor.

3. In the case of delays attributable to the United States, not merely were no penalties imposed, but also the contractor was entitled to a corresponding extension of the period prescribed for the completion of the vessel. These are the delays described in the first place as caused "by any act of the party of the second part," and more specifically as "delays which the Secretary of the Navy shall find to be properly attributable to the Navy Department or to its authorized officers or agents or any or either of them, and to have been a delay operating upon the final completion of the vessel within the time specified therefor in this contract."

Possibly the delays attributable to the United States should be regarded as of two kinds, viz, those attributable to the Navy Department or its

officers or agents, and those attributable to the act of some other Department of the Government, the provision for the extension of time being only intended to apply in the former case. This, however, is unimportant, because in the present case the delay was one attributable to the agents of the Navy Department, being due to the failure of its agents, the armor contractors, to furnish the armor when it was wanted.

In the case of delays attributable to neither party, the contractor might suffer serious loss, but of course, it could claim nothing from the Government on that account, and the provision that no deductions should be made from the contract price on account of such delays gave the contractor all the relief which it could fairly ask. In this case, therefore, no extension of time was necessary, because such an extension could not possibly have any effect on the rights or liabilities of either party.

In the case of delays attributable to the Government, there could be no deductions from the contract price, and this would have been so even if it had not been so stated in the contract. As the court below properly said, "the claimant being without fault in the delay, no penalty could have been imposed upon it without gross error akin to fraud." (Rec., 28.) Hence the provision for an extension of time was not necessary to protect the contractor against deductions on account of delay, and the only possible object for such a provision

was to relieve the Government from pecuniary liability for such delays.

Without this provision for an extension of time the contract would have called for completion of the vessel in three years, but the effect of this provision was to make the contract term three years or such longer time as might be required by delays attributable to the Navy Department or its agents. When the extension was actually made, under this provision, then, by the operation of the terms of the contract itself, it ceased to be a contract for building a vessel in three years, and became a contract for building it in five years, and it is strictly true to say that, under this contract for building the vessel in five years, there was no delay whatever in regard to its completion, and consequently no right to claim damages for such delay.

This contract, which the claimant certainly entered into with its eyes open, can not, it is submitted, be reasonably understood as meaning anything else than that an extension of the contract term should have the same effect as if the date to which the time for completion was extended had been originally fixed in the contract as the date of completion, so that the Government should not be liable for delay any more than it would have been had the vessel been completed within the time originally fixed. There was a very good and a very evident reason for so protecting the Government from liability. A very important part of the structure, the armor, had to be supplied by other

contractors, who had never done precisely this kind of work before. The *Indiana* was, in a very real sense, "battleship *No. 1*," and, in view of the novelty and difficulty of the work, delay was almost inevitable; and as such delay would not be due to any fault of the Government, it was reasonable that the latter should not be liable to the claimant for it. Hence this provision was introduced in order to prevent any such liability.

The court below, however, has held that an extension of the time for the completion of the vessel did not preclude the contractor from recovering for damages due to delays attributable to the Navy Department, and this for three reasons:

(1) The reported cases furnished no authority for so construing the contract as to hold the contractor precluded. (Rec., 25–27.)

(2) The object of the provision for an extension of time was to insure the completion of the vessel and had nothing to do with the question of damages. (Rec., 27–28.)

(3) The contract does not directly state that an extension of the time relieves the Government from liability for delay, and no such relief from liability can be inferred. (Rec., 28.)

These reasons will be considered in their order.

(1) As to this point, it is submitted that the court below has misunderstood the authorities, which are really against its conclusion.

Haydnville Mining and Manufacturing Company v. *Art Institute* (39 Fed. Rep., 484), a Circuit

Court case, was an action to recover for extra work and also for damage due to the delay of other contractors. The contract was for the fireproofing work done on a building, work which would necessarily be delayed if the building was not ready for the fireproofing at the proper time. The contract had this provision:

> Should delay be caused by other contractors to the positive hindrance of the contractor hereto, a just and proper amount of extra time shall be allowed by the architect, provided it shall have given written notice to said architect at the time of such hindrance or delay.

In that case the court said:

> Taking this clause of the contract and the specifications together, I construe them to mean this: That, if the plaintiff was delayed by reason of the tardiness or want of dispatch on the part of the contractors doing the other classes of work upon the building, it should be entitled to such further time for the completion of the work as the architects should allow him (*sic*), but I do not see that there is any provision that it is entitled to pecuniary damages by reason of said delay. Evidently the parties anticipated that this contractor, doing only a part of the work, and that which was largely dependent upon the completion of other classes of the work by other contractors, must await the movements of those other contractors, and it seems to me that the stipulation for further time to

> complete the work in case of delay by other contractors implies that there is to be no pecuniary compensation for such delay.

The only differences between that case and the present are that in the former there were no penalties for delay by the contractor, and the extension of time was to be in case of delay by other contractors; and these differences do not affect the principle involved in the two cases. Penalties or deductions, in a contract like the present one, are merely liquidated damages, and the absence of any provision for penalties merely meant that the contractor was liable for actual damages and not for damages arbitrarily liquidated. If the contractor was entitled to an extension of time, of course no damages could be recovered from him, whether liquidated or not; and, on the other hand, if the contractor was responsible for the delay he would be liable in damages, though perhaps not to as large an amount as if they had been liquidated.

Then, too, the fact that in the *Haydnville Company* case the time was to be extended on account or delays caused by other contractors does not affect the value of that case as a precedent. What is there decided is that where a contract provides that in the event of delays caused by other contractors the time is to be extended, the owner is not liable for damages caused by such delays; and the necessary corollary of this proposition is that where a contract provides that in the event of delays caused by the owner or his agents the time is

to be extended, he is not liable for damages caused by such delays. The gist of the decision is that a provision for an extension of time in case of delays due to any given cause prevents such delays from constituting a cause of action, and the mere fact that the cause for which an extension of time is provided is rather more limited in the *Haydnville Company* case than in the present case is not important.

The court below, however, has seen in the *Haydnville Company* case only the two unimportant differences between it and the present case, and has failed to appreciate the close analogy between the two cases. The opinion says:

> The evident purpose of that provision of the contract, it seems to us, was to relieve both parties from any liability for delays caused by other contractors. That is to say, the plaintiff was not to be held responsible to the defendants for delays caused by other contractors, nor was the defendant to be held responsible to the plaintiff for such delays, both parties being equally blameless. In other words, as between the parties to the contract there was no breach, and hence no right of action accrued to either.

In the present case the contract treats delays for which the Navy Department was responsible precisely as delays caused by other contractors were treated in the *Haydnville Company* case, and one reason for such treatment in the present contract is obviously that the parties knew that there

was great danger of delay on the part of the armor contractors, and realized that as the Government had agreed to deliver the armor "within the times and in the order required to carry on the work properly," it would, in the event of such delay, be liable in damages for what was really not its own fault, unless there were some provision for its relief. This very evident reason for the insertion of the extension clause makes the present contract in this respect substantially identical in purpose with the contract in the *Haydnville Company* case, but even without this reason the analogy would have been very close.

Richard v. *Clark* (88 New York Supp., 242) resembles the present case still more closely, in that delays for which the owner was responsible were provided for. The contract read:

> Should the contractor be obstructed or delayed in the prosecution or completion of his work by the act, neglect, delay, or default of the owner or the architect, or of any other contractor employed by the owner upon the work, or by any damage which may happen by fire, lightning, earthquake, or cyclone, or by the abandonment of the work by the employee through no fault of the contractor, then the time herein fixed for the completion of the work shall be extended for a period equivalent to the time lost by reason of any or all of the causes aforesaid.

The actual delay was caused by the architect, and the lower court gave judgment in the con-

tractor's favor for the damages due to such delay, but the Supreme Court reversed the judgment, saying:

> Nor am I satisfied that any damages in the case are recoverable either for a delay or for extra work. The claim for delay was necessarily based upon the failure of defendant's architects to furnish the detail plans in time, as to which the contract provided that if the contractor "be delayed in the prosecution or completion of his work by the act, neglect, delay, or default of the owner or the architects," etc., "then the time herein fixed for the completion of the work shall be extended for a period equivalent to the time lost by reason of any or all the causes aforesaid." The contract therefore explicitly contemplated a situation such as has here arisen, and the intention of the parties, as evidenced by the agreement, evidently was that the time clause affected the plaintiff alone, and that he might be absolved therefrom to the extent and in the manner provided in the contract.

Had the delay been caused by the owner himself the decision would necessarily have been the same, so that practically that case is on all fours with the present one. As already stated in connection with the *Haydnville Company* case the mere absence of any provision for penalties can not constitute a material distinction, and yet that is the only point of difference which the court below can point out.

Disregarding the close analogy between these two cases and the present case, the court below relies upon *Nelson* v. *Pickwick Associated Company* (30 Ill. App., 333), in which it was held that an extension of time, under a clause similar to that in the *Haydnville Company* case, did not prevent the owner from being liable in damages. The chief reason which the Illinois court gave for its decision, however, is one which does not apply here. The contractor was liable to a penalty of $25 a day for delay, and the court said, "The provision for the extra time was for the avoidance of the penalty the appellant would incur if he did not complete his contract on time." In the present case the contract expressly provided that there should be no deductions for any delays due to circumstances beyond the contractor's control, so that, whatever was the object of the provision for an extension of the time, it is certain that it was *not* "for the avoidance of the penalty the [contractor] would incur if he did not complete his contract on time." The two cases are therefore readily distinguishable.

There is another case, not mentioned by the court below, but cited in argument by the counsel for the Cramp Company, which it may be well to refer to here, viz, *Lawson* v. *Wallasey Local Board* (Law Repts., 11 Q. B. D., 229). This case is clearly distinguishable from the present one because the decision is explicitly based on the fact that the defendant had delayed the work unreason-

ably, which is not the case here. The contract was for dredging, to be completed by a certain date, subject to an extension of time in case a certain temporary staging should not be removed soon enough to permit completion by that date. The staging was not removed until nearly a year after the date set for completion, and the delay in removal was apparently due solely to the defendant's own neglect. Lord Denman, C. J., said:

> We think that, looking at the terms of the contract, which provided for a definite amount of dredging to be done by a certain time, with power to the engineer to extend that time as long as he should think reasonable in case of the nonremoval of the staging, there is an implied contract on the part of the defendants that the removal of the staging should not be *unreasonably* delayed. We think that this is the legitimate inference to be drawn from the case of *Roberts* v. *The Bury Commissioners* (L. R., 5 C. P., 310), which was fully discussed in the argument before us.

Roberts v. *The Bury Commissioners*, cited by Lord Denman, was a case where the defendants had annulled a contract on the ground of the plaintiff's failure to use diligence and make due progress on the work, but the replication stated that this failure was due to a breach of contract on the part of the defendants themselves and their architect. As this averment was not traversed and the rejoinder was held insufficient, the decision was necessarily based upon the facts so

averred. Upon these facts it was held that the defendants had no power to annul the contract, because in so doing they were attempting to take advantage of their own wrong.

The gist of the decision is simply that as the defendants had broken their contract and had thereby delayed the plaintiff, they could not take advantage of that delay to annul the contract; and the application of this doctrine to the *Wallasey Board* case is that as the defendants had delayed the plaintiff *unreasonably* they could not avoid liability by an extension of the time. The defendants could apparently have had the staging removed at any time, and no reason was shown for their failure to have this done; they simply neglected the matter until so much time had elapsed that the plaintiff was seriously damaged. Lord Denman's language, quoted above, clearly implies that the provision for an extension of time was inserted in order to relieve both sides from liability for delay unless such delay was unreasonable. If the work were delayed by the nonremoval of the staging, then the engineer was to grant a reasonable extension of time, which extension would relieve the contractor from all liability for penalties for delay unless he failed to complete the work within such reasonable extension of time; and such extension would relieve the defendants also from all liability in damages for the delay unless their delay was unreasonable, as it was ultimately held to be.

The converse of that doctrine, however, is that if the defendants could not have avoided the delay in removing the staging, so that such delay would not have been unreasonable, they would not have been liable on account of it. This converse proposition distinctly supports the Government's position in the present case, for the delay was not unreasonable as far as the Government was concerned, but was due to the slowness of the armor contractors, the making of heavy armor plate being a novelty in this country, so that the doctrine of the *Wallasey Board* case can not apply. As already stated, the doctrine of the *Pickwick Company* case also fails to apply, because the extension of time was not needed to relieve the contractor from liability for penalties. As far as reported decisions go, therefore, the closest analogy is afforded by the *Haydnville Company* case and *Richard* v. *Clark*, and it is submitted that the doctrine applied in those two cases is the one to apply here.

(2) As to the object of the provision for an extension of time, it is submitted that the court below has misunderstood the contract. The court below has held that the object of the provision for an extension of time was to insure the completion of the vessel in any event, even if the Navy Department should delay the work; and also that it must have been intended that the Government should be liable in damages for delays attributable to it, because otherwise it might delay the work indefi-

nitely to the great injury of the contractor. The opinion says:

> From the language of the ninth clause of the contract it is evident that what was in the minds of the parties was that if through the fault of the claimant the vessel was not completed within the contract time then the penalties by way of deduction from the contract price might be imposed; but if delayed by the fault of the Government then additional equivalent time should be allowed, not in lieu of compensation for damages for such delay but to enable the claimant to proceed to complete the vessel. But for that provision in the contract for additional time, the delay caused by the Government (the claimant having performed its part) would have discharged the claimant from further performance and left it with a right of action for damages on the obligation growing out of the breach. Or the claimant might have continued to perform, reserving to itself the right to sue for such damages as it may have sustained. On the other hand, as the claimant by the terms of the contract agreed that additional time should be allowed equivalent to such delay, it thereby waived its right to terminate the contract for that cause; but the question of waiving its right to damages growing out of such delay was certainly not in the minds of the parties at the time the contract was entered into.
>
> * * * The granting of such additional time was clearly for the benefit of the Government, as it thereby prevented the termi-

> nation of the contract and saved it the expense of reletting the work to other contractors. Any other construction of the contract, it appears to us, might result in irreparable damage to the claimant, for if the Government is not to be held responsible in damages for its delay by reason of a corresponding extension of time then it may delay the work indefinitely and exonerate itself by the mere granting of additional time in which to enable a contractor to complete his work. (Rec., 27, 28.)

In the passage just quoted the court below treats the provision for an extension of time as applying to delays caused by the "fault" of the Government. Had the present case involved any such "fault," there might perhaps have been some justification for holding the Government liable in spite of the extension of time, but the delay was due to the fact that the contractors for the armor "failed to complete the manufacture thereof in time for the defendants to deliver the same to the claimant as they had agreed to do." (Rec., 18, lines 17–19 of Finding III.) This was clearly no "fault" of the Government, and the record does not even state that it was actually the "fault" of the armor contractors—it may have been unavoidable in spite of their best efforts—but even if had been their fault it was not chargeable to any act or neglect on the Government's part. As far as applies to such a cause of delay as the present case involves the

reasoning of the court below is clearly beside the mark.

Assuming, however, for the sake of the argument, that the court below used the word "fault" in a loose sense, as meaning something attributable to the Government or its agents, still it is clear that the court below, in reaching its conclusion, has overlooked certain important provisions of the contract which completely cover the contingencies suggested in the passage quoted above. Setting aside delays due to some tortious act or neglect on the part of the Government's officers, which the contract did not contemplate, and for which it made no provision, and which need not now be considered, especially as no such delays occurred, the only substantial delays which could be attributable to the Navy Department or its agents would be those due either to changes in the plans of the vessel or to nondelivery of armor at the proper time, and the contract provides for the completion of the vessel, in the event of either contingency, entirely apart from this provision of time.

The matter of changes is covered by the second clause of the contract (Rec., 6–7), and whether the word "damage," as used in that clause (Rec., 6, next to last line) includes damages due to delay occasioned by changes or not (a question which does not arise in this case and which need not be decided here), it is certain that, under that second clause, the contractor was required to complete the

vessel in any event, in spite of any delay which changes might cause.

Similarly the third clause of the contract provides for completion in the event of nondelivery of armor at the proper time. That clause provides that the contractor "shall furnish all the armor * * * required in the construction of the protective deck," and that the Government shall furnish all other armor, armor bolts, and their accessories, to be used in the construction of the vessel, including such as may be required in the construction of the belt, turrets, redoubts, barbettes, conning tower, gun shields, ammunition tubes, and in the protection of the guns and loading positions." (Rec., 7.)

This statement of the different kinds of armor to be furnished by the Government is obviously a general statement of all the armor which it was to furnish. The third clause further provides that if the Government should not commence the delivery of "the armor for her side belt, casemate, turrets, redoubts, barbettes, and conning tower" by the time the vessel was complete in all other respects the preliminary trial trip should take place without the armor. (Rec., 7, last eleven lines.) The reference to this armor as "the armor for her side belt, casemates," etc., though slightly differently worded from the expression used a few lines before, is obviously meant to refer to the same armor, viz, *all* the armor which the Government was to furnish, as the Government's obligation to

furnish was the same as to all, and the failure to furnish any one of these species of armor would delay the vessel if the contractor was required to wait.

The third clause further provides that if such preliminary trial of the vessel (without armor) showed that all the conditions and requirements of the contract, except as to the armor, had been fulfilled, the vessel should be preliminarily accepted, or conditionally accepted if she did not have the required speed. Moreover, if the Government should not commence the delivery of the armor within five months after preliminary or conditional acceptance, or before the final trial (which had to be made, if at all, within the five months), then the vessel was to be finally accepted and paid for, the cost of putting on the armor being deducted. On the other hand, if the Government began to deliver the armor within five months after preliminary or conditional acceptance, or prior to the final trial, and continued the delivery with reasonable diligence, the contractor was required to put the armor in place. (Rec., 8.)

These provisions are perfectly clear. They mean that if the delivery of the armor was delayed the contractor could go ahead and complete the vessel without the armor, and be paid without any delay or incurring any damages whatever. Moreover, the contractor would obviously have the same right if the Government, having once begun to deliver the armor, should not continue the

delivery with reasonable diligence, for it can not have been intended that merely beginning to deliver the armor, without more, would meet the requirements of this provision. The contract explicitly states that if the Government, before the final trial or within five months after preliminary or conditional acceptance, should "commence and continue with reasonable diligence" the delivery of the armor, the contractor would have to put it in place; and from this it necessarily follows that if the delivery of the armor, though begun within the time specified, were not continued with reasonable diligence the contractor would not be required to wait for further deliveries, but could deliver the vessel without the balance of the armor (or even without the armor already delivered, if it could not be put on by itself) and should be paid in full whatever was due. Even the reference to five months after a preliminary or conditional acceptance does not mean that the contractor would have to wait for those five months. After such acceptance the vessel could be got ready for a final trip as rapidly as possible, which trip had to take place within the five months, and if the armor was not on hand before the final trip the obligation to put it in place came to an end.

The contract did not, of course, compel the contractor to complete the vessel without the armor, in the event of delay, but it provided that this might be done. If the contractor chose to delay the work on account of the armor, that was its

own affair, and of course it could not fairly claim damages for a delay to which it had voluntarily subjected itself.

This complete provision for the contingency of delay in delivering the armor made it unnecessary to provide for an extension of the time "to enable the claimant to proceed to complete the vessel," as the court below erroneously suggests, because the contractor was clearly entitled "to proceed to complete the vessel" without waiting for the armor. Delay in delivering the armor would *not* "have discharged the claimant from further performance and left it with a right of action for damages on the obligation growing out of the breach," as the court below supposes. The contractor could "continue to perform" without sustaining any damages at all, and while it is true that the contractor had "waived its right to terminate the contract" because of delay in delivering the armor, this was because the contract provided that in that event the vessel should be completed without the armor (or without some portion of the armor), and not because it provided for an extension of time.

This provision for completion of the vessel without the armor protected the contractor's interests much better than the court below supposed they were protected. That the contractor should finish its work and be paid, without incurring any damages, was obviously much fairer than that the contractor should be required to wait indefinitely,

and then sue for damages after the vessel was ultimately completed. Moreover, the provision made it impossible that the Government should, as the court below suggested, "delay the work indefinitely and exonerate itself by the mere granting of additional time in which to enable the contractor to complete its work."

(3) The third reason given by the court below is that the effect of the provision for an extension of time, as relieving the Government from liability for delay, is not expressly stated and can not be inferred. The court says (Rec., 28):

> But this objection [i. e., that the extension of time wiped out all claim for damages on account of delay], the defendants say, should have been considered by the claimant at the time of entering into the contract, and that if not satisfied therewith it could have declined to so contract. This would be true if the contract clearly so recited, or if the language used was susceptible of no other conclusion. We do not think the language used can be construed to exclude claims for damages arising out of such a breach; and if not, then the extension of time would not operate to deprive the claimant of its right to a recovery therefor.
>
> Nor does the doctrine of *expressio unius est exclusio alterius* apply. That doctrine is not of universal application, and is always subject to the intention of the parties, evidenced by the contract.

The court below admits that the provision for an extension of time would have to be understood

as meaning that there should be no liability in damages for the delay "if the language used was susceptible of no other conclusion." It is submitted that that is precisely the case. The language used *is* susceptible of no other conclusion. It must either mean that, or else be wholly superfluous. The provision for an extension of time can not have been intended as a means of relieving the contractor from penalties for delay (as in *Nelson* v. *Pickwick Associated Company*, above cited), for the contract imposed no penalties for the class of delays which would warrant an extension of the time. Neither could this provision have been intended as a means of insuring the completion of the vessel in spite of delays (as the court below suggested), for that matter was fully and explicitly covered by other provisions of the contract. In short, there is nothing else that this provision for an extension of time can mean than just this, that the extension changes the date for the completion of the vessel and wipes out all liability for delays before the date as so changed.

It may indeed be contended that this provision, like all other provisions of the contract, should not be so construed as to work a hardship on the contractor, and that, applying the doctrine of *Lawson* v. *Wallasey Local Board*, above cited, there is an implied contract on the part of the Government that whatever the contract required it to do "should not be *unreasonably* delayed." Even conceding this, however, the fact remains that there

was no unreasonable delay here, the delay being wholly unavoidable as far as the Government was concerned. It was the armor contractors, and not the Government, who actually caused the delay. (Rec., 18.) If the delay in the *Wallasey Board* case had been due to the act of some third party, and not to the board's own neglect, the board could not have been charged with delaying the work unreasonably, and would not have been held liable for such delay.

It is clear, then, that the reasons given by the court below for the existence of this clause for the extension of time fail at every point, the results which the court below supposes were to be attained by the extension being, as a matter of fact, either rendered unnecessary by other provisions of the contract or else attained in a much more satisfactory way.

II.

As to the Second Assignment of Error.

THE FINAL RELEASE OF MAY 18, 1896, RELEASED THE UNITED STATES FROM EVERY KIND OF LIABILITY TO THE CONTRACTOR WHICH COULD ARISE IN CONNECTION WITH THE BUILDING OF THE "INDIANA," INCLUDING LIABILITY (IF ANY SUCH EXISTED) FOR DAMAGES ON ACCOUNT OF DELAY IN FURNISHING THE ARMOR.

The nineteenth clause of the contract contained the following provision:

> When all the conditions, covenants, and provisions of this contract shall have been

> performed and fulfilled by and on the part of the party of the first part, said party of the first part shall be entitled, within ten days after the filing and acceptance of its claim, to receive the said "special reserve," or the surplus, if any, of the said "reserve fund," or so much of either as it may be entitled to, on the execution of a final release to the United States, in such form as shall be approved by the Secretary of the Navy, of all claims of any kind or description, under or by virtue of this contract. (Rec., 15.)

In accordance with this provision the balance of the special reserve, amounting to $41,132.86, was paid the contractor on May 18, 1886, and a release executed containing these words:

> The William Cramp and Sons Ship and Engine Building Company, represented by me, Charles H. Cramp, president of said corporation, does hereby for itself and its successors and assigns, and its legal representatives, remise, release, and forever discharge the United States of and from all and all manner of debts, dues, sum and sums of money, accounts, reckonings, claims, and demands whatsoever, in law or in equity, for or by reason of, or on account of, the construction of said vessel under the contract aforesaid. (Rec., 20.)

If the contract meant, as has been submitted above, that the extension of time should prevent the possibility of there being any claims on account of delay, then of course the meaning of the

provision for a release is immaterial, as far as concerns the present case. This does not mean, however, that the presence of this provision in the contract weakens at all the argument which has just been made above as to the provision for an extension of time. The contingency of other possible claims, besides those due to delay, had to be provided for; and the mere fact that, in providing for a release of such other claims, it was necessary to use language so comprehensive as to include even claims for delay, is no reason for arguing that the provision for extension did not itself affect such claims. It is true that if, as has been shown above, the provision for an extension was intended to preclude claims for delay, it would have been more logical to have specifically excepted such claims from the operation of the release; and yet one can not overlook the fact that it is the general practise in drafting all important written instruments, to multiply provisions, even at the risk of their overlapping, rather than run the chance of leaving anything unprovided for. Redundancy is at least better than a casus omissus.

Even in this view of the case, however, the release may still be regarded as desirable. It was simply a final acknowledgment that the terms of the contract (the time for performance having been extended in accordance with the provisions of the contract itself) had been carried out by the United States. It was a formal confirmation

of all that had been done under the contract, including the extension of time.

If, on the other hand, the provision for an extension of time did not affect claims for delay, then, it is submitted, the provision for a release *must* have been inserted mainly for the very purpose of extinguishing such claims.

The release required by the contract was to cover "all claims of any kind or description under or by virtue of this contract." The actual words of the release are, "all and all manner of debts, dues, sum and sums of money, accounts, reckonings, claims, and demands whatsoever, in law or in equity, for or by reason of, or on account of, the construction of said vessel under the contract aforesaid." The language of the release, though somewhat fuller than that of the contract, must have been intended to cover the precise ground which the contract stated should be covered. There was no authority to require a more complete release, and the words actually used cover the ground at least as completely as do the words of the contract.

The contract being for the construction of the vessel and for no other purpose, it follows that a release of claims on account of such construction must be a release to the United States "of all claims of any kind or description under or by virtue of this contract." Such a release must cover every kind of lawful claim of the contractor, against

the Government, to which anything that was done under the contract gave rise. A claim for damages on account of delay in delivering the armor was certainly a claim "under or by virtue of this contract," because there could have been no such claim had the contract not been made. It was a claim for damages for the failure of the United to do what it had contracted to do, and had the United States not so contracted there could have been no such claim. The claim, moreover, had fully accrued six months before the release was made, for the claim is for damages to November 19, 1895, the date of preliminary acceptance, while the release was made May 18, 1896.

As a matter of fact, claims on account of delay must have been foreseen as more likely to arise than any others. Claims "under or by virtue of this contract" could of course only result from something done or neglected by the Government in the performance of its contract obligation; but while, under the contract, the duties of the Cramp Company were numerous and complex, for it had to build the whole vessel, yet the Government's duties, though important, were very few. It had to pay the installments of the contract price when due, to approve the insurance, to maintain an inspection of the work, if it saw fit to do so, and to determine, by a board of officers, the cost of all changes exceeding five hundred dollars and the damage caused thereby. These were, in their way, comparatively simple matters and not likely

to give rise to claims. As far as concerns the release clause, there could certainly be no claims on account of failure to pay the installments of the contract price, for the release was not to be given until everything due the contractor on the contract was fully paid. There might, conceivably, be claims on account of changes, but it does not appear that there were any changes in the present case, and it is probable that there was from the start very little chance that changes would be made. The approval of the insurance was not likely to give rise to claims, and while, theoretically, some action of the inspectors might do so, the fact that the record discloses no intimation of such a thing is some reason for believing that there was little risk of such claims.

There was, however, one other undertaking of the Government which was really difficult of accomplishment, viz, to deliver, "within the times and in the order required to carry on the work properly," all the armor except that for the protective deck. This armor had all to be obtained from other contractors (Rec., 18), and it is a matter of common knowledge that much of it was of a kind that had never been made before in the United States. As already stated above, the *Indiana* was, in a very real sense, "battle ship *No. 1.*" It is manifest that delay in procuring the armor was the one mischance that was more likely to occur than any other in the carrying out of this contract, and hence that claims on account of such delay were

the one class of claims which the contractor was most likely to have against the Government, and that this fact must have been recognized by the parties when the contract was made. When the Secretary of the Navy required in the contract that a release of all claims should be given before the final payments, he must have had in mind this class of probable claims as the one which, more than any other, made it important that such a release should be required, and the contractor must also have been fully aware of this fact, which was practically self-evident.

The release, being required by the contract itself, was obviously given for a valuable consideration. It was one of the terms of the contract that there should be a release, and the payment of the money which was due under the contract was just as much a consideration for the release as it was for the construction of the vessel itself. The contract can not be cut up into separate parts and one of the claimant's obligations declared to be without consideration, as distinguished from other obligations for which a consideration existed. The consideration must necessarily extend equally to everything which the contractor agreed to do, one of which things was, on receipt of the final payment of all funds reserved, to execute "a final release to the United States in such form as shall be approved by the Secretary of the Navy of all claims of any kind or description under or by virtue of this contract." The release itself shows that $41,132.86

was paid at the time the release was executed, but the consideration was not even limited to this payment. The fact of the payment is merely recited in the release, the consideration for which, as well as for all the other obligations of the claimant, was the total sum paid for the construction of the vessel.

As to the inherent reasonableness of a provision for a release of all claims, including those for damages due to delay, it should not be forgotten that the contract had provided that a failure to deliver the armor at the proper time should not cause any serious delay. The contractor was entitled to complete the vessel without the undelivered armor, and it is manifest that if it had insisted on doing so, no claim on account of the delay could have arisen.

It can not be contended that this release was given under duress, in order to secure a payment of money to which the claimant was lawfully entitled. Under the express terms of the contract the contractor was not entitled to receive the "special reserve, or any part of it," except on "the execution of a final release." The contract may have turned out to be less profitable than the contractor expected, but the time for objecting to its terms was before it was signed. There is no such thing, in the eye of the law, as duress in merely insisting upon the performance of what a man has freely contracted to do.

The court below should therefore have dismissed

the petition on the ground that the claim had been released.

In regard to this release the court below says, however:

> Whatever damages the claimant suffered grew out of the breach by the Government and not by the claimant in its performance and fulfillment of the "conditions, covenants, and provisions" of the contract. The claim, therefore, having arisen out of such breach, was not the subject of release contemplated by the contract, nor was it embraced in the final release. The receipt given by plaintiff did not include the release of claims not considered. * * *
>
> In the present case the claimant was, when it had performed and fulfilled "all the conditions, covenants, and provisions" of the contract, entitled "within ten days after the filing and acceptance of its claim, to receive "final payment, upon the execution of a release to the United States "of all claims of any kind or description under or by virtue of this contract."
>
> As no damages grew out of the performance of the contract by the claimant, no claim was predicated thereon; and as the contract does not provide for the release of claims for damages arising out of a breach by the Government, the signing of the final release does not, for the reasons above stated, conclude the claimant from a recovery, if otherwise entitled. (Rec., 30, 31.)

It is quite true that "whatever damages the claimant suffered grew out of the breach by the Gov-

ernment" and not out of any breach "by the claimant in its performance of the 'conditions, covenants, and provisions' of the contract," and it is equally true that "as no damages grew out of the performance of the contract by the claimant no claim was predicated thereon," but the conclusion drawn from these premises would seem to be a complete *non sequitur*. Damages growing "out of the performance of the contract by the claimant" might properly be the subject of a release given by the Government to the claimant, but the release contemplated by the contract is of precisely the opposite character, viz, a release given *by* the claimant *to* the Government, and the only kind of claim which could be covered by such a release would necessarily be some claim of the claimant against the Government.

The statement that "no claim was predicated" on "the performance of the contract by the claimant" shows that the court below has completely misunderstood the purpose of the release, and this initial misunderstanding seems to have caused the conclusion that "the contract does not provide for the release of claims arising out of a breach by the Government." If this conclusion be true, it can only be because such claims are not "under or by virtue of" the contract.

The view that a claim for damages incurred by a contractor in the performance of a contract, in consequence of a breach of that contract by the other party, is not a claim "of any kind or de-

scription under or by virtue of" the contract, is most extraordinary. Why should it not be a claim "under or by virtue of" the contract, or rather, how can it possibly be anything else? It is a claim under *some* contract, as is admitted by the fact that the suit is brought in the Court of Claims, which has no jurisdiction in tort; and the court below has expressly stated that it grows "out of the breach by the Government . . . of the contract," i. e., the contract for the construction of the *Indiana*. How can such a claim be anything else than a claim "under or by virtue of" that particular contract?

Lastly, the court below says in this connection that "the receipt given by the plaintiff did not include the release of claims not considered," i. e., not submitted to the Secretary of the Navy for consideration before the final payment. The contract says nothing about claims considered or claims not considered, but only that there shall be a release to the United States of "all claims of any kind or description under or by virtue of this contract."

With reference to the latter point, the court below cited its own decision in *Pneumatic Gun Carriage Co.* v. *United States* (36 C. Cls. R., 71). In that case the Secretary of the Navy had expressly excluded claims for damages, due to delays attributable to the Government, from consideration by a board appointed to pass upon certain claims, and had refused to entertain them himself, and it

was therefore held that the release was not "in settlement of the disputed claims between the parties on account of the delay and interruptions." The language of the release in that case was practically the same as in this, but the contract there had been twice modified by supplemental agreements which recognized that the Government had caused the delay, so that the court may there have been justified in holding that the claim for damages due to delay was not covered by the release. This is not specially important, because even if the two cases were precisely alike the case cited as a precedent would be of no greater authority than the decision now under review, so that the only thing to note in this connection is that the decision of the court below is not based on the precedent of any other court. It is, on the other hand, opposed to two authorities, which the court below undertook to distinguish, but which, it is submitted, are really in point.

In *Coulter* v. *Board of Education* (63 N. Y., 365) the contract provided that the final payment should not be made until the contractor had filed a certificate that all claims and demands for extra work, or otherwise under or in connection with the contract, had been presented to the board of education and the amount to be paid therefor agreed upon, and that such last payment was to be in full of every claim or demand whatsoever in the premises, except the amount agreed upon for extra work.

The contractor was put to extra expense by delay caused by some other contractor, but he made no claim on account of such delay until after he had executed the certificate and had received the final payment. The court held that while the terms of the certificate were not of themselves sufficient to constitute a release, yet the contract intended that the final payment should operate as a complete release.

> By this provision the parties evidently contemplated that all claims arising out of or in consequence of the contract should be presented and liquidated before the final payment was made. If the plaintiff had declined to give the certificate he could not have enforced the payment. By giving the certificate he induced the defendant to make the payment, and is, I think, precluded from afterwards setting up other claims. Under the agreement the certificate amounts to a waiver of other demands. The language of the contract is broad and comprehensive—"that such payment is in full of every claim or demand whatever in the premises," whether for extra work or otherwise. It must be borne in mind that this language was used in advance, and we must give it effect according to the intent of the parties; and it seems most rational to suppose that when the certificate was given and the last payment made, together with the amount of other claims which had been liquidated, they designed that the transaction should be

> closed. Parties have a right to make contracts for themselves, and it is the duty of courts to enforce them as made, even though a hardship may be worked. Fraud or mistake may entitle a party to relief, but if neither of these elements exists, the contract must be carried out according to its terms. We think the plaintiffs were required to present this claim and make an effort to have it adjusted according to the contract. Failing in that, they had the option to bring an action or sign the certificate and waive the claim.

The court below undertook to distinguish the *Coulter* case from the present one on the ground that in the former the contractor was required to file a certificate setting forth "all his claims and demands for extra work or otherwise under or in connection with the contract," and that it was his failure to do so which debarred him from thereafter asserting his claim. In the present case, on the other hand, according to the view of the court below, whatever damages the contractor had suffered had grown out of a breach of contract by the Government, and hence the claim was not embraced in the language "all claims of any kind or description under or by virtue of this contract," and consequently was not embraced in the release. As has been already shown above, the present claim must have arisen under some contract, and the contract on which the suit is brought is the only contract under which the claim could have

arisen, so that this attempted distinction between the *Coulter* case and the present one must fail to the ground.

At the trial in the court below there was an attempt to distinguish the *Coulter* case on another ground, which the court below did not think it necessary to discuss, viz, that the Secretary of the Navy had no authority to consider a claim for damages due to a breach of contract, and hence that the present claim could not have been presented to him for settlement. It is true that the doctrine appears to be settled to the effect that an executive officer of the United States has no authority to consider or pay any claim for unliquidated damages for breach of contract; but while the existence of that doctrine might possibly have justified the contractor in refusing to execute the contract or in afterwards requesting a supplemental contract to cover the increased cost of care and preservation or other damages directly due to delay, it should not affect the interpretation of the broad and comprehensive language used in the contract. The important point in this case, as in the *Coulter* case, is that the release required by the terms of the contract was a complete one, admitting of no exceptions or reservations whatever.

If any distinction whatever can be taken between *Coulter* v. *Board of Education* and the present case it must depend upon the terms of the respective contracts in providing for a release. In

the one case the words are "every claim or demand whatsoever in the premises," and in the other case they are "all claims of every kind or description under or by virtue of this contract." It is submitted that the latter phrase is fully as comprehensive as the former, and hence that, as regards the release, no distinction can properly be taken between the two cases.

The bearing of the case of *Phelan* v. *Mayor* (119 N. Y., 86) has been wholly misunderstood by the court below, that portion of the case which is relevant having been overlooked. The suit was to recover a balance alleged to be due upon a contract for regulating the location of a street, but retained by the defendants on account of inspector's fees, and also, *as a second cause of action*, to recover damages sustained by the contractor by reason of the defendants' delay in removing obstructions upon the street, which prevented the prosecution of the work. The court below refers to the first cause of action only, saying "the analogy between that and the present case is hardly perceptible." (Rec., 31.) As a matter of fact there was no analogy whatever, the claim on account of the deduction of the inspector's fees having been specifically excepted from the release which was given, but the court below has totally overlooked the second cause of action, where the analogy is very close.

The report states that upon the completion of the work and the receipt of the final payment the plaintiff executed an instrument by which he released and discharged the city, in the following terms:

> * * * of and from all and all manner of action and actions, cause and causes of action, suits, debts, dues, sums of money, accounts, reckonings, bonds, bills, specialties, covenants, controversies, agreements, promises, variances, trespasses, damages, judgments, extents, executions, claims, and demands whatsoever, in law or in equity, which against them I ever had or now have, or which my heirs, executors, administrators, or assigns hereafter can, shall, or may have, for, upon, or by reason of a certain contract or agreement made [i. e., the contract then in suit] * * * or by reason of any matter, cause, or thing whatever resulting or arising therefrom, * * * except [the claim on account of the inspector's fees].

It was held that this release was a good answer to the second cause of action alleged in the complaint, founded on the delay on the part of the city to remove the obstructions in the street, thereby preventing the plaintiff from proceeding with the performance of the work.

The language of the release in *Phelan* v. *Mayor*

is more verbose than that of the release in the present case, but it is not really any more comprehensive, even understanding the latter release as covering simply the contract requirement of a release "of all claims of any kind or description under or by virtue of this contract." No enumeration of possible claims can go beyond "all claims of any kind or description," and the scope of the words "under or by reason of" is not really increased by adding such words as "by reason of any matter, cause, or thing whatever resulting or arising therefrom."

The court below, through directing its attention to that portion of the opinion in *Phelan* v. *Mayor* which was irrelevant, has undertaken to distinguish that case from the present one; but if it had noticed the portion bearing upon the present issue it would have been compelled to recognize its pertinence.

Changes in the construction of the vessel, and the cost of such changes and the damage caused thereby, are provided for in the second clause of the contract, so that any claim on account of such cost or damage must necessarily be a claim "under or by virtue of" the contract. Similarly, delays are provided for in the third and ninth clauses, and any claim on account of delays for which the Navy Department was responsible (assuming that such a claim was possible after an extension of the time for completion) must also be a claim "under or by virtue of" the contract.

III.

As to the Third Assignment of Error.

THE RETENTION OF THE "INDIANA" AT THE CONTRACTOR'S SHIPYARD, AFTER THE CLOSE OF THE CONTRACT TERM, FOR THE PURPOSE OF HER COMPLETION BY THE CONTRACTOR, DOES NOT AUTHORIZE A CLAIM FOR WHARFAGE.

The cause of action in the present case being the delay in furnishing armor, whereby the completion of the vessel was delayed, it is evident that if any damages be recoverable they must be limited to the amount of the additional expenses incurred by the contractor on account of such delay in completion, and to compensation for any loss or injury which the contractor is proved to have suffered as the direct consequence of such delay. Findings VIII, IX, and XI state certain items of expense incurred by the contractor on account of this vessel, which would not have been incurred but for the delay; but none of the findings show any loss or injury suffered in direct consequence of the delay. Finding X, however, states that the customary rate of wharfage of merchant vessels at the port of Philadelphia at the time the *Indiana* was under construction was one cent per net ton per day, and on the strength of that finding the court has made an allowance of $17,805. Conceding, for the sake of the argument, that the contractor was entitled to damages, it is submitted that such damages should not have included wharfage.

Wharfage is primarily a fee paid for loading goods on a wharf or for shipping them off, but it may also accrue from the use of a wharf as a safe and convenient place at which to moor a vessel, (*The George E. Perry*, 25 Fed. Rep., 780; *The Brooklyn*, 46 id., 132), and it has been briefly defined by this court as "a charge for the use of a wharf." (*Transportation Co.* v. *Parkersburg*, 107 U. S., 691.) This definition was given by way of distinguishing wharfage from tonnage, and for the purpose of such distinction it is undoubtedly correct; but a more complete definition would be "a charge for the use of a wharf by the owner or charterer of a ship or the agents of such owner or charterer." The uses of a wharf which entitle the owner or lessee of the wharf to wharfage may be various, but they are always uses by the shipowner (or charterer) or his agents. In *Ex Parte Easton* (95 U. S., 68) this court said:

> Wharf accommodation is a necessity of navigation, and such accommodations are indispensable for ships and vessels and water craft of every name and description, whether employed in carrying freight or passengers, or engaged in the fisheries. Erections of the kind are constructed to enable ships, vessels, and all sorts of water craft to lie in port in safety and to facilitate their operation in loading and unloading cargo and in receiving and landing passengers.
>
> Piers or wharves are a necessary incident to every well-regulated port, without which

> commerce and navigation would be subjected to great inconvenience and be exposed to vexatious delay and constant peril. * * *
>
> Compensation for wharfage may be claimed upon an express or an implied contract, according to the circumstances. Where a price is agreed upon for the use of the wharf the contract furnishes the measure of compensation, and when the wharf is used without any such agreement the contract is implied, and the proprietor is entitled to recover what is just and reasonable for the use of his property and the benefit conferred. * * *
>
> Repairs to a limited extent are sometimes made at the wharf; but contracts of the kind usually have respect to the voyage, and are made to secure a resting place for the vessel during the time she is being loaded or unloaded. Such contracts, beyond all doubt, are maritime, as they have respect to commerce and navigation, and are for the benefit of the ship or vessel when afloat.

It is manifest that the court was referring to the use of wharves by the owners and charterers of ships, and their agents, and not to use by the owners or lessees of the wharves themselves. The peculiarity of the present case, however, is that the court below has allowed the owners of a wharf to recover wharfage for their own use of their wharf. The *Indiana* did not remain at the Cramp Company's wharf in order to enable the Government to do anything to her, nor was she there for

her own safety; but simply to enable the Cramp Company to complete its work upon the vessel. It was that company, and not the United States, that was making use of the wharf, and it is submitted that there is no authority for allowing wharfage in such a case.

In point of fact, to speak of this item as an allowance for wharfage involves a complete misnomer. It is not wharfage at all, but merely an additional allowance for the use of the Cramp Company's shipyard (which included the wharves), for which the court below has found that "the reasonable value of the use of the claimant's yard, machinery, and tools, and for superintendence in the construction of the vessel, including the general upkeep of the yard, chargeable to the *Indiana* was $3,000 per month" (Rec., 21); but the wharf where the *Indiana* was moored was a part of "the claimant's yard," and this allowance has been made because the *Indiana*, lying at the wharf, was in "the claimant's yard." Hence, it is clear that "the use of the claimant's yard" included the use of the wharf where the *Indiana* lay, and that "the general upkeep of the yard" included the upkeep of that wharf. If a ship were laid up at one of the Cramp Company's wharves for the owner's convenience merely, and not to enable the Cramp Company to do work upon her, there would be no use of the yard except that of the wharf, and the charge would be strictly a charge for wharfage; but in the present case the use of the wharf is

merely a part of that use of the yard for which the court below has made an allowance.

It is apparent that the use of the wharf involved no expense to the Cramp Company beyond that of "general upkeep," for which damages have been allowed, and the findings disclose no indication of any loss or injury suffered by the Cramp Company in consequence of its having had to use one of its wharves for the construction of the *Indiana* for a longer period than it had anticipated. Moreover, even if the findings had shown that the presence of the *Indiana* had occasioned such loss or injury, that could only have been in the "use of the claimant's yard" and the other matters covered by Finding VIII, for which damages have been awarded.

If the *Indiana* had been completed by November 19, 1893, the wharf where she had been lying would then have become available for other uses. The most profitable use to which it could have been put would have been the completion or repair of some other vessel. The record does not show that the Cramp Company was prevented from completing or repairing any other vessel by reason of the *Indiana* occupying a berth at one of its wharves; but assuming, for the sake of the argument, that there was such a vessel, that fact would only prove that, but for the delay here complained of, the items covered by Finding VIII would have been chargeable to such other vessel instead of to the *Indiana*. The court below, having allowed

for "the reasonable value" of the use of the yard, etc., must have intended to cover all the money that the Cramp Company could reasonably have expected to have made from work on some other vessel if the *Indiana* could have been finished and sent off without delay. In other words, the court below has allowed under Finding VIII all that it thought reasonable for the most profitable use of the wharf where the *Indiana* lay.

The court below had some idea that it was falling into error, but did not see the matter clearly. It said, "Regarding the expense for wharfage * * * we are not free from doubt, as the claimant was not a wharfinger, and allowance has been made for the use of the yard." (Rec., 36.) The words, "the expense for wharfage," originated with the court itself, for the claimant had not contended, and could not contend, that it had been put to any expense whatever for wharfage. These words may (and probably do) mean "the charge for wharfage," but if so, the inaccuracy of the language bears testimony to the lack of any clear perception on the part of the court below, as to the true nature of this item of the claim. The statement that "the claimant was not a wharfinger" shows that the court below had a partial idea of the nature of a contract of wharfage, but did not fully understand it. One who is not a wharfinger ordinarily might see fit to act as a wharfinger in some particular instance, i. e., he might contract to give a shipowner the use of a

wharf for his vessel, but in the present case the Cramp Company did what no mere wharfinger could possibly do, viz, completed the construction of a vessel, keeping the vessel at the wharf for the purpose of such construction only. Lastly, the admission of the court below, that "allowance has been made for the use of the yard," recognizes that there is some inconsistency in allowing for that use and also for wharfage; but what the court below failed to perceive is that the allowance under Finding X was not really for wharfage at all, but for "the use of the yard."

If anything more were needed to show the inappropriateness of an allowance for wharfage it would be the excessive rate allowed. Wharfage being primarily, and in the vast majority of instances, allowed for the use of a wharf for unloading and taking in cargo, a matter of a few days only, it is manifest that the Philadelphia rate per day must be intended only for such brief stay at a wharf as would be required for unloading and loading, but $32 a day, or $11,680 a year, would be an enormous rate to pay for the mere right to lay a ship up at a wharf for a long period of time. The court below cites *Ex Parte Easton* (95 U. S., 68–77) as authority for allowing the customary rate in the absence of a contract; but that was a case of regular wharfage, viz, "the use of a wharf by the master or owner of a ship or vessel," and in no way resembled the present case.

IV.

As to the Fourth Assignment of Error.

THE LIABILITY FOR INSURANCE SHOULD NOT EXCEED THE ACTUAL AMOUNT OF THE PREMIUMS PAID DURING THE PERIOD OF DELAY FOR WHICH THE GOVERNMENT IS HELD LIABLE IN DAMAGES, LESS THE AMOUNT OF THE PREMIUMS REFUNDED AT THE CLOSE OF THAT PERIOD, AND ALSO LESS THE AMOUNT SAVED BY THE CONTRACTOR ON ACCOUNT OF HAVING TO MAINTAIN LESS INSURANCE DURING THE ORIGINAL CONTRACT TERM THAN IF THE VESSEL HAD BEEN COMPLETED WITHIN THAT TERM.

The court below finds that the reasonable cost of the insurance of the vessel during the two years' delay was $34,463.55 (Rec., 21–22), and has allowed a part of this, proportioned to the length of time from May 10, 1894. The opinion (Rec., 36) states that the amount allowed is "the reasonable amount paid out by the claimant during that period." In basing the allowance on the amount actually paid out by the claimant during the period of delay the court below has plainly failed to consider that the delay necessarily saved the claimant some expense for insurance during the contract term, which saving should have been deducted. The contract provided "for due insurance of the vessel by the contractor, for the benefit of the Government, which insurance shall be renewed and increased from time to time by and at the expense of the [contractor]

* * * in such companies as shall be approved by the Secretary of the Navy, and in an amount to be fixed, from time to time by him, not exceeding the amount of the advance payments made under this contract." (Rec., 9.) This meant that the amount of insurance was always to be proportionate to the amount of the advance payments, a very necessary arrangement, because each advance payment marked an increase in the Government's possible loss in case of any injury to the vessel while in the contractor's hands. The cost of the insurance was therefore constantly increasing, and reached its maximum just before the vessel was accepted by the Government.

While the findings do not show when the various advance payments were made, they incidentally state that the first twenty-seven were earned by June 20, 1894 (Rec., 19), leaving three to be earned before final delivery; but if there had been no delay, all thirty installments would have been earned and paid by November 19, 1893. Prior to that date, therefore, the insurable value of the vessel was less than it would have been had there been no delay, and the cost of insurance was proportionately less than it would have been. In other words, the delay enabled the contractor to save money on insurance during the contract period, and if insurance after that time be an item of damage the amount so saved should be deducted from the amount allowed for such later insurance,

in order to reach the net amount of extra cost actually incurred by the contractor on this item.

The court below has failed to make this very necessary deduction, and consequently the judgment covers a larger sum for insurance than the contractor actually spent, on account of the delay for which the Government is held liable in damages. The net amount actually so spent should moreover be determined with reference to actual payments made during the period to which the Government's liability extends, while the court below has taken merely a proportion of the amount paid during a longer period, which proportion may be more or less than the actual payments during the shorter period but can hardly be the same.

For these reasons, therefore, the judgment of the court below should be reversed as far as concerns the allowance of any damages on account of wharfage, and also as to the computation of the cost of insurance; but as regards the whole case it is submitted that the judgment should be reversed altogether.

CHARLES J. BONAPARTE,
Attorney-General.

J. A. VAN ORSDEL,
Assistant Attorney-General.

CHARLES C. BINNEY,
Special Attorney.

O

FILE COPY.

FILED.
MAR 20 1907
JAMES H. McKENN

Nos. 263 and 264.

In the Supreme Court of the United States.

OCTOBER TERM, 1906.

THE UNITED STATES, APPELLANT,

v.

THE WILLIAM CRAMP AND SONS SHIP AND ENGINE BUILDING COMPANY.

THE WILLIAM CRAMP AND SONS SHIP AND ENGINE BUILDING COMPANY, APPELLANT,

v.

THE UNITED STATES.

APPEALS FROM THE COURT OF CLAIMS.

REPLY BRIEF FOR THE UNITED STATES

AND

BRIEF FOR THE UNITED STATES UPON THE CROSS APPEAL.

CHARLES J. BONAPARTE,
Attorney-General.

J. A. VAN ORSDEL,
Assistant Attorney-General.

CHARLES C. BINNEY,
Special Attorney.

In the Supreme Court of the United States.

OCTOBER TERM, 1906.

THE UNITED STATES, APPELLANT,
v.
THE WILLIAM CRAMP AND SONS SHIP AND ENGINE BUILDING COMPANY. } No. 263.

THE WILLIAM CRAMP AND SONS SHIP AND ENGINE BUILDING COMPANY, appellant,
v.
THE UNITED STATES. } No. 264.

APPEALS FROM THE COURT OF CLAIMS.

REPLY BRIEF FOR THE UNITED STATES

AND

BRIEF FOR THE UNITED STATES UPON THE CROSS APPEAL.

I.

BRIEF FOR THE UNITED STATES IN REPLY.

(1) As to the Effect of the Extension of Time.

The Cramp Company's brief (p. 3) appears to make a point of the fact that the extension of time was not made until December 4, 1895, fifteen days

after the vessel had been delivered, and that this extension was to that extent retroactive. It is hard to see why this should of itself constitute a ground of objection. Finding IV states:

> * * * and for that reason the time within which to complete the vessel, and thereby release the claimant from the penalties provided for in the ninth[a] paragraph of the contract, was on said date extended by the Secretary of the Navy a corresponding length of time, to wit, to November 19, 1895. (Rec., 19.)

This might perhaps have been better expressed, but it is perfectly clear that the extension of time was actually an extension in accordance with the provisions of the last paragraph of the ninth article of the contract, and the Cramp Company has never contended that it was anything else. There is nothing in that ninth article to require an extension of time to be made at any particular date, and it certainly could not be made until after the period of delay had come to an end and the Secretary had satisfied himself as to the cause of the delay. Whatever be the legal effect of the extension of time, the mere fact that it was necessarily made a few days after the period of delay ended is wholly immaterial.

The case of *Railroad Company* v. *Howard* (13 How., 307, 340; see Cramp brief, p. 3) held that the exercise of one party's right to annul a contract could not make the contract void *ab initio*, so as to deprive the other

[a] The record says "nineteenth," but it is the ninth paragraph or article which is referred to.

party of all remedy upon it for money then due or damages already sustained, but that doctrine has no real bearing upon the issue in the present case. The Government has not attempted to treat the present contract as void *ab initio*, but has merely extended the time for completion in accordance with the ninth article. Of course the Secretary's action in extending the time could not destroy any "vested rights of the Cramp Company," but to contend that the company had any vested right to damages on account of the delay is to beg the whole question of the meaning of the provision for an extension of time. If that provision was intended to prevent the existence of any right to damages on account of the delay, then no such right could ever have vested.

To hold that this provision was so intended is perfectly consistent with the words "shall *entitle* the party of the first part to a corresponding extension of the period." (See Cramp brief, p. 4.) The use of the word "entitle" serves to define the company's rights, and indicates that the extension of time is all that it is to be entitled to under the circumstances.

The case of *Mansfield* v. *New York Central Railroad Company* (102 N. Y., 206; see Cramp brief, pp. 5, 10) is essentially different from the present case. There the contract provided that the contractors should begin work within five days after notice that the foundations were ready, but the defendants had given this notice and had required

the work to begin before the foundations were actually ready, thereby increasing the cost of the work. This was not a matter of delay at all, and the contract, of course, contained no provision for the event of a willful violation of its terms, such as actually took place.

The cases of *Smith* v. *Railroad Company* (36 N. H., 458, 493) and *Sinnott* v. *Mullin* (82 Pa., 333) involved breaches of obligations necessarily implied in the respective contracts, and have nothing to do with an express provision for an extension of time. Similarly *Black* v. *Woodrow* (39 Md., 194) was a case where the defendant had prohibited and forcibly prevented the plaintiffs from completing the work, compelling them to remove their materials, and had then refused compensation on the ground that he had never promised to allow the building to be built according to the contract. It is hard to see what such an absurd defense has to do with the present case.

The Cramp Company's brief (pp. 6–7) criticises the suggestion made in the brief for the United States (pp. 10–11) that there might possibly be delays attributable to the United States other than those of the Navy Department. This suggestion was offered in explanation of certain peculiarities in the wording of the contract, but no argument whatever was based upon it, and it was expressly stated that it could not possibly affect the present case.

The Cramp brief (p. 6) contends that under the terms of the contract the Navy Department was bound to deliver the armor not only within the times and in the order required to complete the work in three years, but even to so deliver it that the vessel could be completed in as short a time as possible, so that the completion of the vessel in three years would not have relieved the Government from liability in case a speedier delivery of the armor would have led to an earlier completion. The meaning of a contract must be gathered from the contract as a whole, understood in the light of the circumstances attending its making and its performance. The third article makes it clear that the armor was not on hand, but was something which had to be made, and it is a matter of common knowledge that it could not be manufactured rapidly. The contractor was allowed ten months in which to make the working drawings and templates for the armor, and until they were furnished its manufacture could not be even begun. The Navy Department was required to deliver the armor "within the times and in the order required to carry on the work properly," but it was not necessarily required to deliver it at such time as would enable the vessel to be completed in less than three years. The reasonable construction of the third and ninth articles is that if the Navy Department was so fortunate as to be able to deliver the armor very early and the contractor was also able to finish its work before the expiration of the three years

the vessel would be delivered and accepted, which would be for the advantage of both parties, but neither party was to be liable for the fact that the vessel was not completed in less than three years.

On page 7 the Cramp brief contends that the only purpose served by the extension of time, if it served any, "was to enable the disbursing officer who paid the voucher to settle his accounts with the accounting officers of the Treasury." This attempted explanation of the provision for an extension of time is wholly inadequate. In the event of delays caused by "fire or water, or of any strike or standout of workmen employed in the construction" of the vessel, the disbursing officer who paid the voucher would have had to make matters clear to the acounting officers of the Treasury precisely as in the case of delays attributable to the Navy Department, and yet in the former case no extension of time was provided for, although no penalties could be deducted.

On the same page it is contended that the release of damages contained in the supplemental contract of May 10, 1894, itself shows that the extension of time was not intended to prevent the claim for damages on account of the delay. As the court below pointed out, no claim for loss or damage resulting from delay had at that time been presented and no extension of time had yet been made, so that the release was required by the Secretary as a precautionary measure to prevent the contractor from thereafter asserting such a claim as regards the delay

which had already occurred. It was impossible for the Secretary to foresee the future or to be certain that the vessel would be completed under such circumstances as to warrant an extension of the time, covering the whole period of delay, so that he may well have thought it necessary to prevent any question from arising in future as to liability for the delay which had already occurred.

The Secretary of the Navy's letter to Congress of December 8, 1896 (see Cramp brief, p. 8), can not possibly control in any way the interpretation of the contract as regards the extention of time. The contractor having undertaken to dispute the effect of that extension in a number of cases, involving in the aggregate a large sum of money, the question had become one of such importance as to demand a decision by the judicial branch of the Government, rather than by the executive or legislative. Under those circumstances the Secretary very properly expressed no official opinion upon the cases, but merely advised their reference to the Court of Claims.

In regard to the authorities cited on pages 10 and 11 of the Cramp Company's brief, it may be said in general that except as regards *Nelson* v. *Pickwick Associated Company*, *Lawson* v. *Wallasey Local Board*, and *Roberts* v. *The Bury Commissioners*, all of which are discussed in the brief for the United States (pp. 19–22), such of them as have any bearing whatever upon contracts to build, are ordinary cases of a breach

of contract on the part of the person for whom the work was to be done, and that they have nothing to do with the effect of an extension of time made in accordance with the terms of the contract. Thus in *New England Iron Company* v. *Gilbert Elevated Railroad Company* (91 N. Y., 153), the contract had been made to build an elevated railroad, but the party for whom the work was to be done chose to disregard the contract and to give the work to another, and it was held that the contract implied a promise that the plaintiff should have the work if it was to be done at all. The bearing of this case upon the present issue seems remote, but it is fairly illustrative of the authorities cited.

The criticism in the Cramp Company's brief (p. 11), that "the case of *Richard* v. *Clark* is at best *obiter*" is wholly unwarranted. The case had been tried before a jury, and while the judgment was reversed the appellate court may well have held that the plaintiff was entitled to lay his case before another jury, upon the basis of the law as laid down by the court upon the questions raised by the appeal, in case he saw fit to do so. The report (88 N. Y. Supp., 242) is too brief to indicate just why a new trial should have been ordered, but it must be assumed that the appellate court acted reasonably. One thing is certain, however, and that is that the law as laid down by that court was not *obiter*, but was necessarily controlling at any new trial.

(2) As to the Effect of the Final Release.

The Cramp Company's brief (pp. 12–13) contends that as the claim for damages was unliquidated, and consequently could not be entertained by the Secretary of the Navy, the final release could not have been meant to cover it. It is true that under the authorities the Secretary of the Navy had no authority to allow such a claim, although while the vessel was under construction during the period of delay he could have paid the increased cost incurred by the contractor for care and preservation during such period, had any request ever been made to him for such an arrangement. The inability to entertain a claim for unliquidated damages might have prevented the Secretary from obtaining a release of such damages in case the contract did not specifically provide for such release, but as the contract called for a release "of all claims of any kind or description under or by virtue of this contract," that language is sufficiently broad to cover claims which the Secretary was not authorized to settle, as well as those which came within his jurisdiction. The contract was not made with the Secretary alone, but with the United States, and hence whatever claims might arise under or by virtue of it would be claims against the United States. The limitations of the Secretary's power to settle any claims of any particular class could not prevent such claims from arising, and there would be just as much reason for requiring from the outset that the contractor should agree to ultimately release all such

claims as that he should agree to release any others. The object of the provision for a release was obviously to prevent the cost of the construction of the vessel from being increased by judgments afterwards recovered on claims for damages, and the words used do not admit of any distinction between one class of claims and another.

The inference sought to be drawn from *Coulter* v. *Board of Education* as an authority for sustaining the present judgment (Cramp brief, p. 14) is wholly unwarranted. The Coulter case held that the receipt alone, apart from the contract, would not have released the damages; but it was the receipt, taken in connection with the contract, which effected the release. So here the defense is not based upon the release by itself, but upon the contract which required the release, the payments under that contract being the consideration for all that the contractor was to do, including the execution of the release.

The case of *Fire Insurance Association* v. *Wickham* (141 U. S., 564; see Cramp brief, p. 15) can not affect a release made in pursuance of a contract expressly calling for a complete release as a condition of payment of the final installment of the consideration.

(3) As to the Item of Wharfage.

The Cramp Company's brief (p. 18) charges the counsel for the United States with *assuming* that the wharf where the *Indiana* lay was a part of the company's yard, but it is hard to see why the statement of

an undisputed fact should be called an assumption. The court below has not thought it necessary to state in so many words that the wharf where the *Indiana* lay was one of the wharves at the company's shipyard, but this was merely because it was never disputed that the *Indiana* was at the company's yard during the whole five years, as various portions of the record sufficiently indicate. For instance, Finding VIII (Rec., 21) gives a statement of the value of "the use of the claimant's yard, machinery, and tools, and for superintendence in the construction of the vessel," during the entire period of delay. If the vessel had not been at the company's yard, no portion of the cost of the upkeep of the yard could properly have been chargeable to it.

The opinion of the court below (Rec., 36), referring to its doubt as to the propriety of a charge for wharfage in view of the allowance made for the use of the yard, shows conclusively that it so understood that the wharf was at the company's yard. The company's brief admits that the company itself owned the wharf (p. 18, line 15), but the court's very reasonable doubt as to the propriety of a charge for wharfage was not based upon the mere ownership of the wharf, but upon the fact that it was one of the wharves of the yard.

II.

BRIEF UPON THE CROSS APPEAL.

A.—As to the Cramp Company's First Assignment of Error.

The Cramp Company was not entitled to a trial trip in the spring of 1894, and the United States should not be held liable for the cost of preparation for such a trip at that time.

The Cramp Company's brief (pp. 24–27) contends that the trial trip for which the company, on March 23, 1894, proposed to offer the *Indiana*, as stated in Finding XII (Rec., 22), was a trial trip under the third article of the contract, not under the tenth article, and that under the third article the company was entitled to a trial trip of the vessel at that time. It is submitted that this contention is not warranted by the facts. The provisions of the third article are these:

> *Provided, however,* and it is expressly understood, covenanted, and agreed, that if, upon the completion of said vessel, including hull, fittings, machinery, engines, boilers, and appurtenances, and equipment and all other work required under this contract, except the fitting, fixing, placing, and securing of the armor for her side belt, casemate, turrets, redoubts, barbettes, and conning tower, the party of the second part shall not have commenced the delivery of such armor to the party of the first part, then and in such case the vessel shall be subjected to the trial provided for in the tenth clause of this contract, and if, at and upon such

> trial, all the conditions and requirements relating thereto, except as to the fitting, fixing, placing, and securing of the armor for the side belt, casemate, turrets, redoubts, barbettes, and conning tower, shall be fulfilled, the vessel shall be accepted as provided for in the eleventh clause of this contract. (Rec., 7–8.)

Now the record shows that the casemate armor had all been delivered by May 1, 1893, the conning-tower tube by the same date, and the barbette armor by September 23, 1893. (Rec., 18). As there was no armor designated as "redoubt," this left only the turrets, side belt, and the conning-tower shield and covers undelivered (out of the armor specified in the third article), so that the conditions of that article, under which a trial trip could be demanded, did not exist. Even conceding that an unreasonable delay in continuing the delivery of the armor, after such delivery had begun, would have entitled the Cramp Company to demand a trial trip, it does not appear that there was any such unreasonable delay in this case. The side armor began to be delivered on August 13, 1894, only about three months after the date suggested by the Cramp Company for the trial trip and less than three months after the delivery of the ammunition tubes, and the findings do not state that this interval was inconsistent with due diligence in continuing the deliveries.

It is manifest that what this third article means is that if the Government found itself unable to supply the armor at all, within any reasonable time, the

contractor could go on and complete the vessel and be paid the entire cost, deducting only the cost of putting the armor in place. This article was not meant to provide for a mere delay in delivering the armor, but for a substantially total failure to deliver it altogether. The line between delay and total failure was to depend upon the date of the completion of the vessel in other respects—the date of "the completion of said vessel, including hull, fittings, machinery, engines, boilers, and appurtenances, and equipment, and all other work required under this contract, except the fitting, fixing, placing, and securing of the armor for her side belt, casemate, turrets, redoubts, barbettes, and conning tower." If *at that date* the Government had not *commenced* to deliver "the armor for her side belt, casemate, turrets, redoubts, barbettes, and conning tower," then the contractor was entitled to a trial trip, and if such trial showed that the conditions of the contract (except as to such armor) had been complied with, the vessel should be accepted, and also paid for, unless the delivery of such armor began within five months after the acceptance. If, on the other hand, the Government had, by the former date, *commenced* to deliver any of the armor specified, the contractor was not entitled to a trial trip until all the armor had been put in place and the vessel completed.

In other words, the contract contemplated the delivery of the vessel under one or other of two conditions, viz, either with all her armor or else without the "side belt, casemate, turrets, redoubts, barbettes,

and conning tower." If she were ready under the former, a trial trip would be made under the tenth article, while if she were ready under the latter, the trial trip would be made under the third article, and such trial trip, if successful, was to be followed by delivery and acceptance. The contract did not provide for a delivery of the vessel with a portion of the armor mentioned above, and hence as soon as the delivery of any of that armor began, the right to request a trial trip under the third article ceased to exist. It was apparently subject to revival in case the delivery of the armor was not continued with reasonable diligence, but that contingency did not arise here and may therefore be disregarded.

In the building of the *Indiana* the contingency which was to entitle the contractor to a trial trip under the third article never occurred. The armor referred to in the provision for such trial trip began to be delivered on March 16, 1893. This was late, it is true, but it was more than a year before the vessel approached such a state of completion (irrespective of armor) that a trial trip would have been possible. What the Cramp Company requested in March, 1894, was therefore not a trial trip under the third article, but something for which the contract did not provide, viz, an anticipation of the trial trip under the tenth article, the vessel being fitted with a portion of her armor, but not with the whole.

Finding XII (Rec., 22) does not state the facts in precise chronological order, nor quite as fully as might be desirable, but a general idea of what took

place may be gathered from it. On March 9, 1894, the Secretary of the Navy wrote the Cramp Company a letter in which he apparently assumed that the trial of the *Indiana* would take place at an early date and that the company was probably making preparations for it, and he requested the company to confer with certain officers in regard to the expenses. While this is the first communication on the subject which the court has seen fit to incorporate in the finding, it must not be inferred that the Secretary originated the idea of such a trial trip. On the contrary, the reference to the preparations which the company was probably making shows that it must itself have brought the matter up at an earlier date. On March 23, 1894, the company gave formal notice "that the vessel, other than the fitting of the armor, had reached a stage of completion ready for an official trial," and it "proposed to offer said vessel therefor between May 1 and 10 following."

The Secretary did not immediately reply to this proposal, being "in doubt as to whether the vessel was ready for such official trial," and he therefore appointed a board of officers to ascertain the fact. This board, on April 18, 1894, reported that the hull of the vessel was about 84 per cent completed, that but half the armor had been fitted in place, and that "the vessel was not then and would not be by May 1, 1894, ready for the official trial trip in accordance with the tenth article of the contract, and that such trial should not, in the interest of the Government, take place until the vessel was fully completed and

ready for delivery." Thereupon the Secretary refused to permit the trial trip.

The Cramp Company's brief disputes the reasonableness of the Secretary's action, but it is submitted that as a trial trip under the conditions proposed would have involved a departure from the terms of the contract, the decision was wholly within the Secretary's discretion, and its propriety is therefore not open to question. Even if the abstract reasonableness of his action could be considered, the opinion of a board of competent officers may properly outweigh the assertions of the company's counsel. The brief (p. 26) refers to the eleventh article of the contract as if that article contemplated a final trial of the vessel without all of her armor, but it is submitted that something very different was meant. That article manifestly refers to a final trial of the vessel with all her armor in place (see Rec., 11, lines 6 to 3 from foot), and it merely provides for the event of her not being fully "armed," i. e., supplied with all her guns. In that event she was to be "weighted correspondingly" (Rec., 12, line 23), but the trial of a vessel without some, or even without any, of her guns is obviously a different matter from a trial without a portion of her armor, which is really a part of her upper structure.

The only possible criticism that can fairly be made is that the Secretary might have appointed the board of officers six weeks sooner, when the Cramp Company first brought the matter up. That this would have been better may be conceded; but it is equally true

that as the proposed trip would have been useless the claimant ought not to have suggested it. The initial error was the claimant's, and it does not appear that the Secretary was at all aware how useless a trial trip would be until after the board reported. It seems that the claimant's original suggestion misled the Secretary into supposing that a trial trip might be useful. Under the circumstances the claimant ought to have asked, in the first instance, that a board should be appointed to ascertain whether a trial trip would be useful or not. As the Cramp Company did not take this necessary precaution, it ought fairly to assume all the consequences of its failure to do so. Its position is analogous to that of a person chargeable with contributory negligence.

This item, be it observed, differs from all the other items in this case, in that the loss alleged was not, strictly speaking, due to delay, but merely to an error of judgment on the Secretary's part in not acting more promptly in formally refusing to authorize a trial trip. This error of judgment had nothing to do with the contract, for the contract did not provide for a trial trip until the vessel was "completed and ready for delivery." The contractor proposed a trial trip outside the terms of the contract, and the Secretary was at first misled into an informal acquiescence. Under the doctrine of *Lee* v. *Monroe* (7 Cranch, 366), *The Floyd Acceptances* (7 Wall., 666), and *Whiteside* v. *United States* (93 U. S., 247), such an error in judgment on the Secretary's part can not impose a liability upon the United States.

This latter point was fully recognized by the court below (see opinion, Rec., 37), which rightly held, however, that the Cramp Company could not be regarded as having been misled and injured by the Secretary's failure to announce an immediate refusal, because the company was bound to know that under the terms of the contract the offer of the vessel for trial at that time was premature.

B. As to the Cramp Company's Second Assignment of Error.

The release of damages contained in the supplemental agreement of May 10, 1894, was made for a new and valuable consideration, and should be given full effect.

Finding V (Rec., 19) states the facts in regard to this release, which the court below properly held to be binding. The consideration was the payment of $234,830 some eighteen months before it was legally due. The contract had provided for payment "in thirty equal installments, as the work progresses, with a reservation of 10 per cent from each installment" (Rec., 15). By May, 1894, it was evident that the vessel could not be completed for some time yet, and therefore the Cramp Company wished to receive some of the money which the contract required should be reserved to be paid on final completion. While this money was not yet legally due, the amount of the retained percentages was thought to be more than was required to protect the Government against loss, and hence the Secretary of the Navy agreed to pay

the Cramp Company $234,830, being an amount equal to the retained percentages on the first twenty-three installments, and in consideration of this advanced payment the company released the Government "from all and every claim for loss or damage hitherto sustained by reason of any failure on the part of the [Government] to comply with this contract." The court below held that this provision for a release

> * * * must be treated as a precautionary measure by the Secretary to prevent the claimant from thereafter asserting such claim. Such provisions are common, especially in the modification of contracts where one party seeks to obtain a benefit thereunder in advance of the time specified for in the contract, and it would not do to say that such precautionary measures by executive officers are not within their jurisdiction or that such contracts are in their nature the settlement of unliquidated claims. (Rec., 35.)

This view of the court below is manifestly reasonable. The release was given for a new and valuable consideration, viz, the payment of a large sum of money nearly eighteen months before it was due under the terms of the contract. The total price to be paid for the vessel was $3,063,000 and whatever speed premium it might earn. Of this sum twenty-seven thirtieths, or $2,756,700, had already been earned, and $2,481,030 paid, leaving $275,670 in reserve. Three more installments, or $306,300,

remained to be earned, but no part of the $275,670 held in reserve could be paid until after preliminary or conditional acceptance of the vessel, an event which did not take place until November 19, 1895. Under this supplemental contract the greater part of this reserve, viz, $234,830, was paid seventeen months before it was due. The mere interest on $234,830 for seventeen months saved to the contractor by this payment amounts to $19,960.55, apart from the fact that the use of money is sometimes worth even more than the legal interest on it. Surely this advance payment was a good consideration. As a matter of fact, the entire damages due to delay before May 10, 1894, as computed by the court below, only amount to $42,263.55, a little more than double the amount of the interest saved to the contractor by this advance payment. In view of the uncertainties of the case, an advance payment which enabled the contractor to save $19,960.55 in interest before November 19, 1895, was worth a release of possible damages, ultimately fixed at $42,263.55, but (as the event has proved) not recoverable for over a dozen years. At all events there was a valid consideration, whether small or great, which the contractor agreed to take for the release.

It was reasonable that such a release should then be given, both because the full extension of the time for completion had not yet taken place, and also (without regard to the possible effect of an ultimate

extension of the time for completion) because this release was the only consideration which the company could offer for the change in the contract and the advanced payment of this sum of money. The fact that this agreement required security to be given against loss or injury by reason of the payment does not affect the point that the money was paid before it was due under the contract, and that it constituted a consideration for the release. A payment, to constitute a consideration, does not have to be absolute, and the fact that the Government might, under certain conditions which never arose, have called for a refund of the money paid does not overcome the fact that the Cramp Company received $234,830 some seventeen months earlier than it was entitled to receive it under the contract, or the further fact that the company agreed to make the release in consideration of such advanced payment.

The Cramp Company's brief contends that the release is void, because there was no consideration for it. In this connection the brief charges the court below with "entirely overlooking the trial trip provided for in the third article." It is submitted that the court below did not overlook that article; it merely realized that the company was not entitled to the trial trip which it had asked for, either under the third article or under the tenth, as the conditions actually existing did not warrant a trial trip under either of those articles. The company's brief also charges that the finding of the court below—that on May 10, 1894, the Secretary of the Navy had

not finally decided the cause of the delay—is erroneous, and it insists that the responsibility for delay was as well known to them then as now. The *cause* of the delay was undoubtedly as well known in May, 1894, as it is to-day, but the Government's legal responsibility was not then known, and in fact it can not be known until the present case is decided.

The contention that the Cramp Company was entitled to the money paid under this agreement of May 10, 1894, without being required to execute any release of damages, is really based on the theory that the company was then entitled to a trial trip of the *Indiana*, and that if such trial trip had been held the vessel would have been accepted and the money paid without any supplemental agreement and release of damages. It has already been shown that the company was not entitled to a trial trip in May, 1894, and it necessarily follows that the company was not entitled to deliver the vessel and to receive payment of the reserved percentages. It is true that the Government was entitled to retain this money only for the purpose of securing the completion of the work, as stated in *Quinn* v. *United States* (99 U. S., 30, cited in the Cramp Company's brief, p. 29), but it had an absolute right to retain the money until such completion, and until that time the money did not belong to the company in any absolute sense, and the United States was undoubtedly the legal owner of it.

To say, as the company's counsel do, that "the United States never parted with any of its money," and that "it merely exchanged securities," is to lose

sight of the facts altogether. The United States actually paid out $234,830, which were not at that time due, and the fact that it took security to cover the possible chance of having to call for a repayment in the future, can not change the fact that the money was paid. To contend that a release given in consideration of a payment of money was invalid because the payee also had received a bond of indemnity is as unreasonable as it would be to contend that a mortgage was invalid because the mortgagee had also received the mortgagor's bond for the repayment of the money. Certainly the court will not permit the disadvantage to the Cramp Company of its having to give security, to weigh against the advantage of its receiving the money which it desired to have, any more than the disadvantage to a mortgagor of having to give security would be allowed to weigh against the advantage of his receiving the money borrowed.

The passage from *Fire Insurance Association* v. *Wickham* (141 U. S., 564, 580), cited on page 30 of the Cramp Company's brief, has no bearing upon the present issue. The court there held that in that particular case payment of an insurance loss sooner than the policy required was not a consideration to support a compromise, because the evidence wholly failed to show that the parties so intended, and the right to delay payment could be waived. In the present case there can be no question whatever but that the parties did intend that the payment of the

money before it was due was to be the consideration for the release, for the supplemental agreement expressly provides that "in consideration of such advance payment the party of the first part hereby releases the party of the second part." The company, having executed an agreement stating that the advance payment was the consideration, can not now be heard to say that there is no evidence of consideration.

The contention that the Government never carried out the terms of the agreement of May 10, 1894 (Cramp brief, pp. 30–31), is based upon an incomplete quotation from that agreement, which did not provide that the Government should pay "so much of the aggregate amount of the last three installments of the contract price as will leave," etc., but that it would pay "so much of the aggregate amount of the three last installments of the contract price *and* of the reservations from previous payments as will leave," etc. The sum to be paid was to be taken out of a fund consisting of the last three installments and the reservations from the prior installments, treated as a whole, and it made no possible difference whether the payment was measured by one of the constituent portions of the fund or another. The fact that the amount paid was equal to twenty-three out of the twenty-seven installments already paid is wholly immaterial, as the Secretary of the Navy could have paid whatever amount he thought would leave a reasonable balance in his hands. He chose to pay a

certain multiple of the reserved percentages, but if he had chosen to pay a certain multiple of the last three installments the effect of the payments would have been precisely the same.

The contention that the Secretary had previously paid the Cramp Company less than it was entitled to, and that the payments under the supplemental agreement merely righted that error (Cramp brief, pp. 31–32) is unwarranted by anything in the record. The contract provided that "payments shall be made by the United States in thirty equal installments, as the work progresses, with a reservation of 10 per cent from each installment." The findings show that the contractor had been paid twenty-seven thirtieths of the entire contract price, less the reserved percentages, and the findings do not even suggest that more than these twenty-seven thirtieths had yet been earned. In fact, Finding V (Rec., 19) refers to "the twenty-seven installments earned," implying certainly that no more had then been earned. The fact that the Secretary believed that the retained percentages constituted an unnecessarily large contingent fund merely shows that the contract was not drawn up with more than human foresight, but it can not alter the legal rights of the parties.

The Cramp Company's brief (p. 32) advances the further contention that as the Secretary of the Navy had no authority to pay a claim for damages for breach of contract, therefore he had no authority to procure the release of such a claim by the giving of any

consideration whatever. The contention is ingenious, but can scarcely bear the test of examination. The doctrine that an executive officer has no power to settle a claim for unliquidated damages (as to which see *Brannen* v. *United States*, 20 C. Cls. R., 219) is a highly technical one, apparently based upon the same doctrine of strictly limited authority which prevents the Government from being bound by his unauthorized acts or declarations. (See *Whiteside* v. *United States*, 93 U. S., 247, 257.) This doctrine should not be stretched beyond its proper limits. It prevents an executive officer from destroying in advance any legal defenses which the Government may have to claims against it, and from paying claims which a court might conceivably hold to be legally invalid or excessive, but it does not prevent him from protecting the Government against claims which might possibly be prosecuted against it. If an executive officer, in the exercise of any of his acknowledged powers, can protect the Government against liability to claims, he can do so, even though the claim be one which he would have had no authority to discharge by payment.

The doctrine that an executive officer can not pay a claim for unliquidated damages for breach of contract can not affect his power to make contracts on behalf of the Government, or to change those which he has made, such power having its own particular limits. The contract in the present case (art. 2, Rec., 6–7) provided for the contingency of changes in the work, although such changes might consider-

ably increase the total cost, and it could likewise have provided for the contingency of increased expense to the contractor due to delay in completion. Had the contract not provided for the contingency of changes in the work, it would have been within the power of the Secretary of the Navy to provide for the cost of any such changes by a subsequent modification of the contract, and it would have been equally within his power to make a supplemental contract in regard to such increased expense as the contractor might incur in consequence of delay. Similarly it was within his power to modify the contract as regards the payments, so as to avoid retaining until the vessel was accepted as large a proportion of the consideration money as the terms of the contract required. In so modifying the contract, it was undoubtedly within his power to require some consideration from the contractor in return for such advanced payment, and it can make no difference whether the consideration required was a release of a claim which the Secretary had no authority to pay, or was any other kind of consideration. As long as he had authority to modify the contract, he could certainly use that authority for the purpose of protecting the Government against claims. His act in securing such protection can not be compared to an act which would tend to prevent the Government from protecting itself by any legal defense. It is acts of the latter character, and not of the former, which an executive officer has no authority to perform.

The second reason advanced by the Cramp Company against the validity of the release of May 10, 1894, is that "it was procured under conditions and circumstances that amounted to legal duress" (brief, p. 33). It is difficult to treat such a contention seriously, even apart from the fact that in executing the release the contractor "at the time does not appear to have made any objection or protest" (Rec., 19). The Cramp Company's counsel assume that the delay in the completion of this vessel, and the consequent postponement of the time when the contractor would be entitled to be paid in full, caused the contractor such financial embarrassment that the release given in consideration of the advanced payment made under the agreement of May 10, 1894, was given under duress. As far as concerns the present record this is an assumption pure and simple. There is not a word in the findings to justify it, and it can not be the subject of judicial notice. Undoubtedly the contractor wished to be paid as soon as possible, and if all the money could not be paid in May, 1894, the contractor wished to receive as much of it as he could, for it is not in human nature to wish to postpone the receipt of money when interest is not running upon the claim; but the mere desire to be paid is no evidence of financial embarrassment.

Paragraph XI of the petition (Rec., 3) did indeed state that the Secretary of the Navy refused to permit a trial trip, and also refused to pay the

contractor the money then earned and due to it, in order to take advantage of its financial necessities caused by the delays and defaults of the United States, and coerce the company into releasing its claim, but the findings do not contain a word to substantiate the allegations of financial embarrassment and of coercion, and hence the facts alleged in the petition are simply to that extent not proved, and must therefore be disregarded. The record disclosing no "conditions and circumstances that amounted to legal duress," the contention as to such duress must necessarily fall.

It is therefore submitted that the cross appeal should be dismissed.

CHARLES J. BONAPARTE,
Attorney-General.

J. A. VAN ORSDEL,
Assistant Attorney-General.

CHARLES C. BINNEY,
Special Attorney.

O

FILE COPY.

Office Supreme Court, U. S.
FILED.
MAR 9 1907
JAMES H. McKENNEY
CLERK

IN THE

Supreme Court of the United States

No. 263

THE UNITED STATES, APPELLANT,

vs.

THE WM. CRAMP AND SONS SHIP AND ENGINE BUILDING COMPANY, APPELLEE.

No. 264

THE WM. CRAMP AND SONS SHIP AND ENGINE BUILDING COMPANY, APPELLANT,

vs.

THE UNITED STATES, APPELLEE.

Brief for the Cramp Company,

Appellant in No. 264 and Appellee in No. 263.

JOHN C. FAY,

Attorney for Appellants, The Wm. Cramp and Sons Ship and Engine Building Company

HOLMES CONRAD,
EPPA HUNTON,
Of Counsel.

IN THE

Supreme Court of the United States.

THE UNITED STATES, Appellant, *vs.* THE WM. CRAMP AND SONS SHIP AND ENGINE BUILDING COMPANY, Appellee.	No. 263.
THE WM. CRAMP AND SONS SHIP AND ENGINE BUILDING COMPANY, Appellant, *vs.* THE UNITED STATES, Appellee.	No. 264.

Brief for the Cramp Company, Appellant in No. 264 and Appellee in No. 263.

Statement.

This was an action brought in the United States Court of Claims by the Cramp Company to recover for the damages accruing to them by reason of the breach of the contract on the part of the United States for the building of the battleship Indiana.

On November 18, 1890, the United States entered into a contract with the Cramp Company, by which the company agreed to build and complete the vessel on or before three years after its date, the United States agreeing to furnish the armor to the company at their ship-yard "within the times and in the order necessary to carry on the work properly." This the United States failed to do and delayed the completion of the vessel for two years after the expiration of the contract term.

The Court of Claims found that the delay of two years was due to the fault of the United States, and that the damages accruing to the Cramp Company was $177,823.55, but held that as to part of this, the company had released the United States, and rendered judgment for $135,560 only, they also disallowed a claim for $17,514.04, being the expenses for making the vessel ready for a trial trip without her armor. From this judgment an appeal was taken by both parties.

The United States assigns four errors, and the Cramp Company assign two, and the questions to be determined on this appeal and cross-appeal are:

1. Did the extension of time under Article IX, of the contract, pp. 9–10, exonerate the United States from liability?

2. Did the receipt of May 18, 1896, Finding VI, p. 20, release the United States?

3. Is wharfage a proper element of damage?

4. Is the cost of insurance properly estimated?

And on behalf of the Cramp Company:

1. Does the agreement of May 10, 1864, release the

United States from all damage arising before that date? (Ex. W. C. & S., No. 2, p. 5.)

2. Is the United States liable for the expenses for getting the ship ready for preliminary trial? (Finding XII, pp. 22-3.)

First.

Did the extension of time exonerate the United States from any damages occasioned by the breach of her contract?

The facts upon which this conclusion of law is sought to be drawn are set out in Finding IV (R., p. 19) and are that because on the fourth day of December, 1895, *fifteen days* after the vessel had been completed, delivered and accepted by the United States the Secretary of the Navy extended the time of completion, *retroactively*, to the date of acceptance; he thereby discharged the United States from all liability to respond to the damages caused by its breach of its contract.

Precisely what would have been the liability of the United States if the order of extension had not been made by the Secretary we are not admonished by the learned counsel; but we may assume that but for the retroactive extension, the United States would be liable in the same manner as all other delinquents are. The bald proposition is, that after this liability occurred, the Secretary of the Navy by the magic of this order utterly destroyed the vested rights of the Cramp Company and acquitted the United States from all liability.

R.R. Co. vs. *Howard*, 13 How., 342.

The findings show that the cost of the entire delay was brought about by the United States, and no part of it was in any degree chargeable to any act or default of the Cramp Company, and that the default caused a loss to it of $177,823.55. How the extension of time compensated the Company for this loss is not explained, but it is insisted that the words "shall *entitle* the party of the first part," which are usually understood to confer a benefit, are by the construction of learned counsel claimed to confer a loss. Without them he does not deny that the United States would have been bound to bear the consequences of its own default; but with them the ship company became "entitled" to the inestimable privilege of bearing the loss itself. If this is a right conferred on us by the contract we most respectfully waive the benefit of it.

The proposition is somewhat startling, to say the least of it, but unless some artificial or abstruse rule of law has taken the place of and superseded natural justice and fair dealing, it is as unsound and untenable as it is originable and ingenious, but, nevertheless, the learned Attorney General argues, and with apparent sincerity, that the effect of the provision for an extension of time was "to make the contract term three years or as much longer time as might be required by delays attributable to the Navy Department or its agents." If this be true it is not possible to conceive why the United States convenanted to deliver material "within the time and in the order required to carry on the work properly;" such a construction makes that covenant utterly meaningless.

In the case of Manfield *vs.* N. Y. C. R. R., 102 N. Y., 213, the Court of Appeals of New York says:

> "It is unreasonable to suppose that the parties intended to enter into obligations providing for the performance of work by one party under a heavy penalty for non-performance within a given period, which yet left it optional with the other to facilitate or retard such work at its pleasure or discretion."

And again:

> "A construction which enabled the railroad company to retard the prosecution of the work by the contractors or disabled them from employing all of the agencies or force which in their judgment could be wisely and advantageously used in its performance would operate as a fraud upon them and render their covenant to complete the work in five months a reckless and foolhardy undertaking."

It would be the equivalent of saying that A agrees to do certain things in consideration that B does certain other things, but at the same time while A will hold B to his contract A will do as he pleases about performing his.

Even if no promisd had been written in the contract the law would have implied it.

Smith *vs.* R. R., 36 N. H., 458, 493.

Surratt *vs.* Mallin, 82 Pa. Stat., 333.

Black *vs.* Woodrow, 39 Md., 194.

The discrimination that the learned counsel makes between delays occasioned by the United States and the

officers of the United States connected with the Department of its Navy is not only very subtile but amusing. What branch of the public service except the Navy Department was to have to do with the building of this warship is not suggested, but it is seriously argued that, if possibly the Postmaster General or the Secretary of Agriculture should cause the delay, the time was not to be extended but simply no penalty was to be imposed.

The completion of the vessel was not fixed definitely at *three years*, but "on or before" three years, and the United States was to furnish the armor in proper time and order to carry on the work properly; if the work was not progressing satisfactorily, under Article XIII, R., p. 13, the contract might be declared forfeited. This made it incumbent on the United States to furnish the armor so that the vessel could be completed in as short a time as possible, and its failure to do so undoubtedly made it responsible for any damage that accrued, during the contract period as well as after. If it delayed the work three months, but still the vessel was finished in three years, it could not escape, but if the delay was so great that it exceeded the three years, then by extending the time it could. The logic of the United States is that for *short delays* not involving an extension of time the United States was liable, but for *long delays* it could escape by granting an extension.

The labored argument to show that there was to be no extension of time except in case the delay was caused by the officers of the navy is the purest *sophistry;* what was to happen if the delay was caused otherwise? Was the

vessel to be abandoned at the expiration of the contract period, or was it to be finished after the contract period expired? The only conclusion that can be drawn from the contract is, that the company were to go on, and that was the construction placed on the contract by the parties, because the work went right along after the expiration of the contract period as before; the time was in fact extended long before the Secretary made his order, in fact the extended time had expired more than two weeks before. The only purpose the order served, if it served any, was to enable the disbursing officer who paid the voucher to set-settle his accounts with the accounting officers of the Treasury. It appearing that the vessel was not finished till November, 1895, some explanation had to accompany the voucher to show why the penalties had not been deducted as the contract provided, or the voucher would be suspended for explanation.

The learned Court of Claims, in its opinion (R., pp. 27, 28), shows very conclusively why the construction of the IXth Article of the contract now claimed by the appellants never could have been in the minds of the parties, and that such construction would do violence to its language and perpetrate a wrong and hardship on the Cramp Company. The exaction of the special release of May 10, 1894, R., p. 16, where the Cramp Company was required to release all claim for damages sustained by reason of the failure of the United States to comply with its contract, would have been unnecessary if the parties to the contract had understood that a mere extension of time wiped out any claim; the contract term had then long since expired,

and the United States were in default in furnishing the armor. Why, if the Secretary believed that by a stroke of his pen he could wipe out the liability of the United States, did he exact this release? His view of the contract is further illustrated in his letter to Congress of December 8, 1896, in response to the Act of June 30, 1897, directing him to examine this claim and report to Congress (Ex. H. R. Doc. No. 69, 54th Cong., 2d Sess.) wherein he states that there was delay and part at least was due to the failure of the United States to furnish armor as required, "and in my (his) judgment the interest of justice demand that they (the claim) should be referred to the Court of Claims," and while he does refer to and call attention to the release of May 10, 1894, and says the Cramp Company claims exemption from its effect on the ground of duress, he never intimates that it was ever for a moment suspected by him that the extension of time, which he himself had made, was intended to acquit the United States, but says that "justice demands" the reference to a court. If the "extension of time" barred a recovery how idle to put the Cramp Company, as well as the United States, to the cost and expense of a litigation. When suit was brought why was not this extension of time pleaded as a release instead of the tiresome and expensive taking of a volume of proof on both sides? This position is not only an afterthought, but a very poor one. (See Appendix.)

The cases cited by the learned counsel, *i. e.*, Haydenville M. & M. Co. *vs.* Art Institute, 39 Fed. Rep., 484, and Richard *vs.* Clark, 88 N. Y. Supp., 242, are so fully dis-

posed of in the opinion of the learned Court of Claims that it would seem to be almost a work of supererogation to further criticise them. The learned counsel, in his endeavor to bring this case within what he deems to be the ruling in the Haydenville case, assumes that the word "failed," in Finding III, p. 18, implies negligence or fault upon the manufacturer of the armor from whom the United States bought it. That is a strained construction. If it had been true, the United States would have been able to recoup any damages that it is forced to pay; but in view of the fact that the whole record in the court below showed an exactly opposite state of facts, it is not quite candid on the part of the learned counsel to try to torture this word into any such meaning.

As the contract provided in Article IX, R., p. 19, that "delays in obtaining materials" was not to exempt the Cramp Company from penalties for delay, the effort of the United States to escape liability upon the same ground that they denied to the other party to the contract is hardly commendable.

It is, however, immaterial whether the manufacturers were in fault or not; they were not responsible to Cramp Company, nor had we any contract relations with them; we can only look to the United States. We do not think the Haydenville case sound law, even as there applied, for the great current of authorities hold it to be the duty of the employer to have the work in readiness for the contractor.

In the case of Sharp *vs.* Ross, 4 N. Y. (Keyes), 554, the court held:

"If one contracts to perform work, if he finds obstacles in the way which cannot be removed without the payment of money, it is the duty of the party contracted with to remove the obstacles, and so enable him to perform his contract. He may require the party to remove them and if such party fails, he will be excusable and may recover full profits."

In Mansfield *vs.* N. Y. C. & H. R. R. Co., 120 N. Y., 206, the court says:

"Where the obligation of performance by one party to a contract presupposes the doing of some act on the part of the other prior thereto, the negligence or refusal by the latter to perform such act not only dispenses with the obligation of performance by the former, but also entitles him to rescind or, where rescission will not afford him an adequate remedy, to continue the work and recover damages against the defaulting party as the delinquency has occasioned."

See also,

Peck *vs.* Collins, 70 N. Y., 382.
Booth *vs.* Mill Co., 74 N. Y., 21.
Jones *vs.* Kent, 80 N. Y., 558.
Allamon *vs.* Mayor, 43 Barb., 33.
N. E. I. Co. *vs.* R. R., 91 N. Y., 153.
Lawson *vs.* Hogan, 93 N. Y., 39.
Dubois *vs.* D. & K. C. Co., 4 Wend., 285.
Lawson *vs.* Wallasy, L. R. Wend O. B., 229.
Kellogg *vs.* Hamilton, 110 U. S., 108.
Roberts *vs.* Bury Imp. Co., L. R. 5 C. P., 325.
Mansfield *vs.* N. Y. Cent. R. R., 102 N. Y., 205.

Lawson *vs.* Wallasey Local Board, 52 L. J. C. B., 302.
Dubois *vs.* Del. Canal Co., 4 Wend., 285.
Nelson *vs.* Pickwick Assn., 30 Ill. App., 333.
U. S. *vs.* Mueller, 113 U. S., 153.
Blanchard *vs.* Blackstone, 102.
Skelsey *vs.* U. S., 23 Ct. Cls., 61.

But its attempted application to the facts in this case would render it still worse.

The case of Richard *vs.* Clark is at best *obiter*, for the merits of the appeal had been disposed of and a new trial awarded, which, if the expression of the opinion by the justice was the law, it was idle to remand the case to be retried; it would have been remanded with directions to dismiss the complaint. The doctrine is not sound and it finds no support in any other case, and is at war with the cases above cited and common justice, and permits one to take advantage of his own wrong, and enables one to plead the breach of his contract as a bar to recover damages for the breach, and in the case at bar it would be writing into a contract a construction that neither party ever suspected that it meant.

The well known doctrine that a contract is to be taken most strongly against the party who prepares it is here invoked, and if such an unconscionable construction was to be claimed by the United States, as is now attempted, the United States ought to have taken care to have used some language that would not have to be extended by ingenious construction.

Second.

Final Receipt.

The final receipt was nothing more or less than an acknowledgment of the payment of the balance of the special reserve, and while it was very verbose the multiplicity of words did not change its legal effect.

Its first recital (R., p. 20) disproves that it was the result of the adjustment of a disputed or disputable account for every "condition," "covenant," and "provision" of the contract on the part of the Cramp Company had been "performed and fulfilled," and in consideration thereof, and for no other consideration, became entitled to receive the money paid. It is now claimed that this sum of money not only paid this claim, but that it also embraced other distinct claims, to wit., unliquidated damages arising from the breach of the contract on the part of the United States, which were not only not presented or considered, but were of such a character that the Secretary of the Navy had neither the right, authority, or jurisdiction to consider, adjust, or pay. It would have been idle to have presented a claim for damages for delay to the Secretary for adjustment. He was not clothed with authority to act upon it, nor was he supplied with any appropriation of public money with which to liquidate it.

This question has been often decided by the Court of Claims, has been so held uniformly by opinions of successive Attorneys-General and the decisions of the Comptrollers of the Treasury.

In Brannan's Case, 20 Ct. Cls., 223, the court says, no authority exists in executive officers to allow claims for damages, and approves the decision of the Secretary of War that "there is no authority in any executive officer to allow claims for damages on contract;" the fact that the converse of this proposition is now urged by the United States is the only justification of citing authorities to the contrary.

McKees *vs.* U. S., 12 Ct. Cls., 555.

Powers *vs.* U. S., 18 Ct. Cls., 263–275.

Dunbar *vs.* U. S., 19 Ct. Cls., 493.

McClure *vs.* U. S., 19 Ct. Cls., 179.

Dennis *vs.* U. S., 20 Ct. Cls., 119–121.

Pneumatic Gun Carriage Company *vs.* U. S., 36 Ct. Cls., 71.

Opinions Attorney-General, 4 Opin. 327–367, 6 Opin. 516, and others.

Decision of 2d Comptroller A. D. 1860, Secs. 458–464.

And in the case of McElrath *vs.* U. S., 102 U. S. 426 this court allowed the United States to recover back a payment made which the accounting officers had no authority or jurisdiction to allow.

There was no necessity to protest; a protest would not have had any effect whatever.

The claim for damages here sued for was not a claim "under and by virtue of the contract;" it did not arise by reason of the fulfillment on the part of the Cramp Company of all the conditions, covenants and provisions that he undertook. It arose not under, but by reason of the violation of the contract by the United States.

The case of Coulter *vs.* Board of Education, 63 N. Y., 365, distinctly holds that a receipt as comprehensive as this does not release such damages as are here claimed, and the general words upon established principles would be limited to the items specified, and cites 1 Edw. Ch. 34; 1 Cowan, 122, and cases there cited in support of this proposition; so far as that case is applicable to this it is an ample authority for sustaining the decision in this case.

The part of the decision that the United States invokes has no application, in that the Board of Education was clothed with the power and authority to adjust these unliquidated claims, and the court puts its decision upon the agreement that claims "arising out of or in consequence of the contract should be *liquidated*." *Coulter* was required to present his claims under the contract for extra work, and all other claims; they were then to agree upon the amount due and he was to receive the balance.

Here the Company was not to receive anything except the balance of the special reserve of the contract price; nothing was to be considered with respect to the final release except for the work provided in the contract, not even the extra work and certainly not the damages for delay. Large amounts of extra work were done, but they were not to be considered or paid for in this accounting.

If the Secretary had had jurisdiction to entertain the claim for delays and had found as the court did that the damages were $177,000, and that $150,000 of extra work had been done, could it be claimed that the payment of

the balance of the special reserve due upon the contract ($41,132.86), was to be in final discharge of them? To state the proposition is to refute it, still that is just the effect the United States seeks to assign to it. The second article of the contract provides for extra work and for the ascertainment of its value. Neither the extra work nor the speed premiums were to embraced in this final receipt; it was a final receipt only for the balance of the contract work, and neither its language nor Article XIX of the contract extends it beyond that (R., p. 15).

In the case of *Fire Insurance Co.* vs. *Wickham*, 141 U. S., p. 577, where a release executed upon payment of the fire loss was claimed to cover the cost and expense of raising the vessel, this court said:

> "It was not seriously contended that the defendant was not legally liable upon its policies for the expenses clearly incidental to the fire, as well as for the direct injury to the vessel in consequence of the fire, and if the plaintiffs were induced to settle their claims for one-half the amount that was due them, and there was no consideration for the relinquishment of the other half, this suit will lie for the recovery of the amount. The rule is well established that where the facts show clearly a certain sum to be due from one person to another, a release of the entire sum upon payment of a part is without consideration, and the creditor may still sue and recover the residue."

See also,
U. S. *vs.* Bostwick, 94 U. S., 53, 67.

In the case of the Pneumatic Gun Carriage Co. *vs.* U. S., 36 C. Cls., 71, this identical question was before the court, upon a receipt in the exact form, and upon a claim arising from delays on the part of the Government in supplying material, and the court there held that it was no bar to the suit. On page 93 the court says:

> "The Secretary of the Navy having expressly declined to give the board appointed to investigate the account authority to award any damages for delays and interruptions, and having refused to entertain these claims himself on the report of this board it cannot be said that the release given was in settlement of disputed claims between the parties on account of the delays and interruptions. These demands remained open on their merits. The receipt given by the plaintiff was not founded on any agreement to release claims not considered, and it was not a settlement of matters excluded from consideration by the Secretary. There was no adjustment of differences by way of compromise and settlement of claims for delays because of the unreadiness of the vessel at the proper place or because of interruptions to plaintiff in subsequently endeavoring to install its pneumatic system upon the monitor at Brooklyn." * * * "If the balance conceded by the Secretary was due by the terms of the contract, the payment thereof did not create a new consideration for the relinquishment by plaintiff of its other demands against the United States. To make the receipt of a part the discharge of the whole there must be a new consideration or a voluntary and well-understood compromise of a disputable and disputed claim (Child *et al. vs.* United States, 12

Wall., 232, and 7 C. Cls., R., 209; Mann *vs.* United States, 17 Wall., 67, and 8 C. Cls., R., 125; Comstock's case, 9 C. Cls., R., 141)."

"Nothing can be treated as a consideration that is not intended as such by the parties (Insurance Association *vs.* Wickham, 141 U. S., R., 564, and authorities there cited; Cape Ann Granite Company *vs.* United States, 20 C. Cls., R., 1.)"

"In the progress of the work the attention of the Secretary of the Navy was constantly called to the causes which operated to create the claims for damages. Both supplemental contracts recognized the fault to be largely on the defendants. When the settlement came to be made the Secretary kept within the terms of the contract and directed the payment of sums only which he had the right to direct to be paid."

"As the causes which gave rise to the claims for damages were not considered by the board for want of jurisdiction, and were disregarded, no doubt, by the Secretary for the same reason, so far as his official action was concerned, judgment will be entered in favor of the plaintiff. (See also Lovett *vs.* U. S., 12 C. Cls., R., 84, affirmed Sup. Ct., 94 U. S., 53; Baldwin *vs.* U. S., 15 C. Cls., R., 297.)"

See also McLaughlin *vs.* U. S, Ct. Cls.

The case of Phelan *vs.* Mayor does not appear to be applicable to the case at bar. The effect of the final receipt in that case as now claimed for it is at variance with the case of *Coulter* and the cases there cited.

The ruling of the Court of Claims as to this should be affirmed.

Third.

That wharfage should not have been allowed.

The occupation of the Company's wharf was just as legitimate a charge as any other, certainly as the occupation of the shops, the yard and the use of the tools. The vessel had to be berthed somewhere after she was launched, and the Company had to provide a wharf for two years. This allowance as the court says in its opinion (R., p. 36) includes the pay of watchmen, dredging out the basin, tug service in moving her to and from the wharf, and other expenses usually incurred by wharfingers in maintaining a wharf to afford a berth for this vessel. If the vessel had been berthed at an adjoining wharf, the Cramp Company would have been compelled to pay wharfage. What difference does it make that the company itself owned the wharf? The vessel had to be kept somewhere while awaiting the delivery of the armor, and as she was afloat it is hard to see where she could have been kept except at a wharf. The counsel for the United States simply disagrees with the court as to matters of fact. He assumes that this wharf is part of the yard, and its occupation is included in the allowance for superintendence, use of yard, &c., while the court says it is not. If it was and the court had simply added it to the other item instead of allowing it as a separate item, as it was claimed in the petition and proved by the evidence, the United States would have had no complaint. This court can hardly judicially know what it is worth in the port of Philadelphia to berth a vessel of 10,000 tons displacement, drawing 24 feet of water, 350 feet long and 66 feet

beam, and costing over three million dollars, exclusive of armor, and it would hardly be appropriate to take the learned counsel's assertion as against the finding of the Court of Claims, derived from the testimony of numerous ship-builders, merchants, ship-brokers, and wharf-owners, adduced before them. The allowance for wharfage covered an outlay for dredging of $15,504.50; tug service, $5,783, and watchmen, $2,080, a total outlay of $23,367.50, so that the allowance for wharfage merely reimburses the company for its actual cash outlay.

Fourth.

Insurance.

The theory of the counsel for the United States is purely chimerical. He imagines that the Secretary might have required more insurance than he did during the contract period, but there is no finding of fact on which to base his theory; he should have proved his premises and asked a finding and not relied on imagination. The Secretary was the sole judge of how much insurance should be carried, limited only by the fact that he could not exceed the amount of partial payments. He was not required to demand the maximum; all he could fairly do was to keep sufficient insurance to meet any probable loss; this he did, and during the contract period the company paid it. This was an iron vessel and its total destruction by fire was impossible. The little inflammable material it contained could not have caused a loss anything near the cost of the vessel. By the method adopted by the court, which was the way the claim was made, the Cramp Company did not get as much as they were

entitled to. They only got the amount actually paid out during the delay. It is a matter of common knowledge that insurance premiums are paid in advance, and by this means all the premiums that were paid before the period of delay which carried the insurance during the delay were not allowed. To illustrate, the premiums for insurance taken out for one year from July 1, 1893, the Company got no credit for, and so as to all other payments prior to Nov. 19, 1893. These amounts, which are facts capable of proof, vastly exceed in amount any imaginary deficit in insurance that might have been required but which was not, there is no possible way of determining that moot question.

As the court below allowed the Company less than they were entitled to the United States has no ground of complaint.

The error of the United States is twofold: first he offered no proof and could offer none and asked no finding as to the amount of insurance that was omitted during the contract period, and failing to do this, it is unbecoming to criticise the Court of Claims. His second error is in overlooking the fact that insurance premiums are paid in advance, and the only proper way to arrive at the correct amount, if a proportion of the two years' delay was to be allowed was exactly as the court below did. The proof before that court showed the dates of payment and the period they covered. The argument of counsel is parallel with his theory as to the effect of the extension of the contract both equally valueless.

Respectfully submitted. JOHN C. FAY,

Atty. for W. C. & S. S. & E. B. Co.

IN THE SUPREME COURT OF THE UNITED STATES.

THE WILLIAM CRAMP SONS SHIP AND ENGINE BLDG. CO.	No. 264.
vs.	
THE UNITED STATES.	

Cross Appeal from the Court of Claims.

Brief of the Cramp Company, Appellant, on Cross Appeal.

STATEMENT.

The facts out of which the *cross appeal* grows are contained in the proviso of the third article of the contract (R., p. 7), and in Findings V and XII (R., pp. 19, 22, 23), and are substantially as follows:

Up to March, 1894, three months after the contract period had expired, the United States had failed to furnish any of the *heavy armor* for the vessel as provided in Article III (Finding II, R., p. 18), or any at all in its proper order, and the vessel was then entitled to a trial trip under the provisions of said article without her armor, both the Department and the contractors expected such a trial would take place, and this had been the universal course of business up to that time in the building of seven vessels (Finding XII, 2 par., R., p. 22). The Secretary of the Navy, under date of March 9, 1894, wrote to the Cramp Company stating that "in view of the fact that the trial would take place at an early day and as you (the Cramp Company) are now probably making

preparation therefor," that he had directed two of his officers to supervise the expenses incurred in *preparing* the vessel for trial. This they did, and the vessel was prepared for such trial under their supervision at an expense of $17,514.94, and the vessel was tendered for its trial trip without its armor on between May 1 and May 10, 1894 (R., pp. 22, 23). The Secretary refused to permit the trial trip to be made until the vessel was fully completed and ready for delivery under Article X of the contract. He also refused under Article XI (R., p. 11) to release any of the retained percentages on the twenty-seven partial payments already made, or to make any further payments until after the trial trip had taken place.

If the trial had taken place the claimants would have received, approximately—

Retained percentages, 27 installments, about...	$270,000
Three installments (under contract), about.....	300,000
Special premium earned.....	50,000
	$620,000
Trial expenses.....	17,514
	$637,514
Less special reserve.....	60,000
	$577,514

all of which, except the trial expenses, but for the default of the United States, would have been paid to the Cramp Company prior to November 19, 1893.

In addition to this the Company, as found by the court, had already expended $42,263.55 in the care of the

vessel after the expiration of the contract period (Finding XIII, R., p. 23), so that the United States fairly and honestly owed the appellants at this time $619,777.55 and probably another $50,000 for additional speed premium if the trial had taken place then.

Under this state of case $234,830, being the reserved percentages of 23 of the 27 installments earned by the appellants, was turned over to them upon their furnishing a bond with surety to return it to the United States on demand, as an indemnity against loss or damages, and the further condition was exacted that all loss or damage occasioned by the failure of the United States to comply with its contract was released (R., pp. 16, 19).

Assignments of Errors.

1. The court erred in failing to allow the additional sum of $17,514.94, the expenses incurred in preparing for the preliminary trial.

2. The court erred in holding the supplemental contract of May 10, 1894, to be valid.

3. The court erred in failing to allow the sum of $177,823.55, the total cost and expense as found by the court during two years' delay instead of the sum of $135,560.

4. The court erred in not rendering judgment for the sum of $195,338.49, being for the full two years' delay and the trial expenses instead of $135,560.00.

ARGUMENT.

Preparation for Preliminary Trial Trip.

It is difficult to understand how the learned court below failed to allow this item of expense, except upon the theory that the court entirely overlooked or failed to give any force or effect to the proviso of Article III of the contract (R., p. 7). No mention whatever is made of it either in the findings or the opinion, and the opinion seems to assume that the Company took the initiative in proposing such a trip, and had acted on the sole theory that it was in accord with the previous course of business instead of a right under the contract. The facts as found by the court (Finding XII, p. 22) are quite the reverse of this contention.

On March 9, 1894, the Secretary first called the Company's attention to the fact that a trial would take place at an early date, and designated his officers to supervise its preparation; not until more than two weeks had elapsed, viz., March 24, 1894, was it that the Company gave notice that the vessel, except as to the "fittings of the armor," would be ready for trial between May 1 and May 10, 1894. The Secretary permitted all this preparatory work to go on, well knowing that it would be much more than a year before it would be possible to furnish the armor, and he well understood that no such trial trip as was provided for in Article X was ever contemplated or could possibly be made. No officers would have to be designated to supervise expenses, if no temporary work was to be done. No preparation was necessary if the vessel was entirely

completed. But such a detail was necessary and of value if the vessel had to have temporary work to fit it for trial; if its armor shelf was to be planked up, in the absence of armor; if a temporary pilot house was to be built in the absence of conning tower; if the turret and redoubt spaces were to be planked in the absence of turrets and redoubts; if the vessel was to be properly weighted down with pig lead and iron and the weights properly distributed it was highly necessary that naval officers should be designated to supervise this work and to check expenses, that would have to be borne by the United States, if she was to be tried without her armor as Article III stipulated. Both parties understood that clause of the contract alike; it was a contemporaneous construction of that proviso, and the Secretary has never denied or intimated that he did not so understand it. The findings show (Finding XII) that the Secretary refused to permit that trip to be made because a board reported that "*the vessel was not then and would not be by May 1, 1894, ready for the official trial trip in accordance with the tenth article of the contract, and that such should not in the interest of the Government take place until the vessel was fully completed and ready for delivery*" (R., p. 23).

"Upon that report the Secretary acted." The first part of the report gave the Secretary no information that he did not already have. He knew as well before as he did after that the vessel was not finished. The board did not say that it was not in condition to be tried under Article III, neither did the Secretary. Seven previous vessels had been tried under the same conditions (XII

Finding, p. 22). The reason, and the only reason given, is that "in the interest of the Government" a trip should not take place "until the vessel is fully completed and ready for delivery."

Is it possible that the United States can disregard the obligations of its contract and the rights of the appellants and saddle a cost of $17,000 upon them under any such pretext as that?

The trial of the vessel was to test "the hull and fittings, the machinery, including engines, boilers, and appurtenances, the equipment and speed of the vessel" (R., p. 11). The hull was completed, except the part left for the side armor. That was simply weight. It was no part of the structure of the vessel. It did not affect its staunchness. A similar number of tons of pig lead properly distributed would test the strength of the hull and its resistance. So as to the weight of the turrets the vessel properly weighted down would test its speed. The machinery, engines, and boilers were all complete. Article X, p. 11, contemplated weighting down the vessel, and even a *final trial* under the second paragraph of Article XI (R., p. 12), the vessel, if not fully armed or equipped, might be "weighted correspondingly," and up to the final trial, five months after delivery, the Company was bound to make good deficiencies, and had given satisfactory bonds to do so.

In view of the very large amount of money that was contingent upon the success of this trial trip it was one of the most important parts of this contract to the Company, and in further view of the fact that the *expense* of

an unsuccessful trial was to be borne by the Company, no harm could come to the United States if it was unsuccessful.

The refusal of the Secretary to permit a trial in the face of the plain terms of the contract, and which carried with it such dire consequences to the Company, and when the United States was in default in furnishing the armor under the terms of its contract, was unjust, unfair and oppressive, violative alike of the rights of the Company as well as every principle of fair dealing. It is respectfully urged that the learned court below erred in not allowing the appellants the sum of $17,514.94, which they find was the reasonable expense incurred in preparation for this preliminary trial trip, every dollar of which expenditure was caused by the failure of the United States to comply with the terms of its contract.

The learned court below (R., opinion, p. 37) seemed to place the rejection of this item on the ground that the Secretary of the Navy had no lawful authority to authorize this trial trip, but Article III expressly provided for such a trip and it was to be made "under conditions prescribed or approved by the Secretary of the Navy (X Article, R., p. 11). The exact condition had arisen that he foresaw when the contract was made, and the Company was entitled to relief. It was the duty of the Secretary to cause the vessel to be tested, and the contract contemplated a test in a much less advanced stage of work than the vessel actually was in when it was offered for trial.

Supplemental Agreement, May 10, 1894.

1. The appellants contend that this agreement is invalid and of no force and effect, because

First. It is founded upon no valid or valuable consideration, and was not within the jurisdiction of the Secretary to exact.

Second. That it was procured under considerations and circumstances amounting to duress.

First.

The learned court below expressed grave doubt as to the validity of this release (opinion, p. 35) and reluctantly held it to be founded upon a sufficient consideration; but in doing so we respectfully submit fell into several serious errors of fact upon which their conclusion was based.

One is, in entirely overlooking the trial trip provided for in Article III, another, is the assumption that on May 10, 1894, the Secretary had not decided the cause of delay, that is to say the responsibility for the delay was then in dispute. The Findings V (p. 19) were modified by inserting "finally decided," so as to exclude the idea that the responsibility for the delay was in doubt, but the opinion was not changed. The responsibility for the delay was as well known then as now, as is fully shown by Finding III (R., p. 8). None of the heavy armor had even begun to be furnished until months afterwards. These two facts very materially weaken, if they do not destroy, the conclusion which the court so reluctantly reached.

All that has been said about the right of the appellants to a preliminary trial under Article III is applicable here. If that is true, then more than three times the amount paid was due and owing at the time this release was exacted. Finding III (R., p. 18) shows that "The claimant would have completed the vessel within the contract period if it had not been for the failure of the United States to furnish materials, etc., as they had agreed to furnish." How can it be claimed that the retained percentages which certainly had been overdue since Nov. 19, 1893, were not payable, unless the United States can escape by taking advantage of its own wrong? The findings show that the appellants released a valid indebtedness of $42,263.55, and in its true sense were not paid anything; they were allowed to receive $234,830 of money earned by them, and which was only on deposit with the United States as a security for the faithful performance of their contract, by substituting for it a bond with approved securities and which they would have received if the trial had taken place. That is as near as it comes to being a payment. The money they got belonged to them. The United States has no ownership in it. It was not money of the United States. The United States had a contingent right only to apply it to make good any default. (Quinn *vs.* U. S., 99 U. S., 30) The United States never parted with any of its money. It merely exchanged securities. In lieu of cash it took bonds. It paid nothing whatever. Instead of changing its condition to its disadvantage it bettered it to the extent of over $42,000. The cold

analysis of this transaction is that the Company to obtain $234,000 that belonged to them paid the United States $42,000 to get it. They not only took the loss but paid a bonus for the privilege of getting it.

The only consideration that passed in this transaction was from the Company to the United States. Any consideration to the Company is absolutely wanting.

In Fire Insurance Co. *vs.* Wickham, *supra*, it was contended that the payment of the loss five days after proof of loss instead of waiting for sixty days was a sufficient consideration for the release, the court says, p. 580:

> "There is no doubt that this right to delay payment was a stipulation which the insurer could waive at his own option (Ins. Co. *vs.* Norton, 96 U. S. 234, 240) and if as the plaintiff stated the Insurance Company did exercise this option and agree to waive their right to sixty days' delay, the prepayment cannot be regarded as a consideration to support the alleged compromise."

While the following point may be technical, it is a fact that the United States never carried out the terms of the agreement of May 10, 1894. That agreement provided that the United States should "pay so much of the aggregate amount of the last three installments of the contract price," etc., but they never paid one cent out of these three installmen ts. What was paid was under a different arrangementaltog ether (Findings V, R., p. 19). Not one dollar was ever paid (?) under the terms of the agreement of May 10, 1894. True it is that in June, 1894, the reservations on 23 of the 27 installments were

turned over to the Company, on the execution of a bond, but that was not according to the terms of the agreement of May 10, 1894. That agreement provided for a part payment of the last three installments. No part of either of them was paid, and while it may be immaterial out of which fund the money came, so long as the Company got it, still if the United States insists on standing upon this agreement it behooves it to comply with its strict requirements. Strictly speaking the United States never carried out its part of the agreement of May 10, 1894. It may have released something near the same amount of money, but the doctrine of *Cy pres* does not apply. It did not do what it covenanted to do, and before it can insist upon the enforcement of an unconscionable agreement it ought to show that it had performed strictly its part of the bargain.

The contract provided for payments to be made as the work progressed: that was the *vital* point in paragraph 2 of Article XIX (R., p. 15); the number of installments and their exact equality was merely a matter of convenience it was a provision of no particular advantage to either party, but that the contractor should receive payment for his work (less ten per cent.) as he performed it was of vital interest. On May 10, 1894, the company ought to have been paid for the work that they had done under the very terms of the contract, and if the Secretary of the Navy under the method he had adopted to ascertain the amount of work performed had failed to pay them for it, he was bound to make another estimate and right that error, and this is all he did. He was to

pay what the work amounted to *less* the special reserve, *less* the cost of all unfinished work, *less* all deductions likely to be made on account of deficiencies, *less* all contingencies likely to happen, and even then to exact a a bond of indemnity with sureties. The balance certainly was what was due, and it ought to have been paid without the exaction of a bond. It represented less than the work done and showed that the partial estimates had been short. How the receipt of such a payment could afford a consideration for the release passes comprehension.

See *Fire Ins. Co.* vs. *Wickham, supra; U. S.* vs. *Bostwick*, 94 U. S., 53, 67.

On May 10, 1894, the United States owed the appellants for damages accruing to them by reason of the breach of the contract on the part of the United States, then an unliquidated claim. This claim the Secretary of the Navy had no power or jurisdiction to settle or adjust. See cases cited, *supra*. Could he do *indirectly* what he was unauthorized to do directly? If he could not extinguish this claim by payment, could he give the Company any other consideration for its extinguishment? If so, where did he get the power, and what did he convey to the Company as the consideration? It was not retained percentages, for they had earned those in the construction of the ship. It was not an anticipated payment for they were already six months overdue. He was without power and without funds to compensate the Company for their claim, and to exact a release of something that he could neither recognize nor adjust was simply *brutem fulmen*.

If he had paid the claim the United States could have sued and recovered back any sum that he had paid, and if that is so, can the United States hold a release without payment to be valid? (McElrath *vs.* U. S., U. S.)

Second.

Another and very cogent reason exists why this release should not prevail, and that is that it was procured under conditions and circumstances that amounted to legal duress.

To establish this defence it is not necessary to show threats, fear of bodily harm, nor any of those conditions which in old times were necessary to make out such a case. The modern doctrine recognizes the fact that coercion is exercised more potently by more effective and insidious means than brute force, and there now exists but little, if any, difference between undue influence and duress.

It may be conceded for the purpose of this case that the current of authorities is to the effect that the mere refusal to pay a debt, thereby forcing a creditor to receipt in full for a part only, does not constitute duress, but that is *provided that the debtor has done nothing unlawful to cause the financial embarrassment which compelled the creditor to submit to the extortion* (Am. & Eng., Enc., 1st Ed., Vol. 6, p. 72), and the converse of that proposition is equally true, that whenever the debtor has, by any unlawful means, produced a financial condition that has compelled his creditor to submit to his

extortion, a receipt or release will be avoided for duress.

Hackley *vs.* Headley, 45 Mich., 569.

Vyne *vs.* Glenn, 41 Mich., 112.

In the case of Vyne *vs.* Glenn, 41 Mich., 112, the defendant informed the plaintiff that he had stopped payment due him from third parties; he knew that this would cause plaintiff's financial ruin and compel him to settle, and relied on a settlement made under these circumstances. In passing upon this question the court says:

> "It is idle to say that such a settlement was free and voluntary. To say that the plaintiff had a legal remedy * * * may be true generally, but where the wrong done was for the evident purpose of forcing a settlement not in accordance with the legal rights of the parties and where the delays incident to litigation would work ruin * * * to hold that he had a legal remedy for the wrong * * * would not meet the difficulties of a case like the present."

In the case of Hackley *vs.* McGordon, 45 Mich., 569 the court held:

> Duress exists when one, by the unlawful act of another, is induced to make a contract or perform some act under circumstances which deprive him of the exercise of free will;" and while holding in that case that duress was not made out, approved the decision in *Vyne* vs. *Glenn*, and distinguished it from the case then being decided because it was not pretended that Hackley & McGordon had done any-

thing to cause the conditions that made this money so important to him at this very time, or that they were in any manner responsible for his pecuniary embarrassment except as they failed to pay this demand.

So in the case of Adams *vs.* Scheffer, 17 Pac. Rep., 21 (Colo.), the court there makes the same exception where financial embarrassment was the alleged duress, and holds that it " does not constitute duress if the purchaser has done nothing unlawful to cause such financial embarrassment."

And so in the case of Little *vs.* Bowers, 134 U. S., 554, this court excepted cases where payments were made when an immediate and urgent necessity existed therefore.

The doctrine is well founded on the familiar maxim that no one can be permitted to take advantage of his own wrong.

This case comes clearly within this rule. The unlawful act of the Secretary of the Navy in refusing the trial trip to which the Company was entitled under Article III of the contract, and thereby depriving them of upwards of $700,000 that they otherwise would have been entitled to, produced such a financial condition that coerced the signing of the release. No more effective coercion could have been enforced if the Secretary of the Navy had trained its guns on the Company's shipyard, and exacted the release under threat of bombardment.

It is to be borne in mind that the trial was to take place "under conditions prescribed by the Secretary,"

and until this trial was had, no money was payable. It was much more than the mere withholding of money; it was making it impossible for the Company to demand any. The Company could not lay out a course on the high seas over which the trial was to take place. The Secretary's attitude left the Company helpless. No suit could give them adequate relief, for they would be met at the threshold with a demand for proof that the vessel fulfilled speed requirements. No mandamus would lie, for the Secretary was clothed with too much discretion. His failure to furnish armor and thereby entailing a loss and expense on the Company of over $42,000 intensified the pressure brought to bear on the Company, and brings the case strictly within the doctrine contended for. This all happened in the spring of 1894 during the height of a financial panic, when bank accommodations were practically withdrawn and when the Company had to meet weekly the wages of its ten thousand employees.

One reason given in the books why a refusal to pay does not constitute duress is that the law affords a complete remedy to the creditor. He has his action and may recover his full debt, *interest for its detention and be reimbursed his costs.* That does not apply to the United States. The United States is a favored party. Neither interest nor costs can be recovered, and if an individual declines to give a release demanded he has but a limited remedy. The United States can protract litigation almost indefinitely; can put the claimant to endless cost, and at the end the claimant can only recover the bare principal of his claim, *suffer the loss of all interest and pay his expenses of litigation out of his own pocket.*

No better illustration can be given than the record of this case discloses. The petition was filed August 10, 1897 (R., p. 1); the judgment was rendered January 29, 1906 (R., p. 7), eight and one-half years later. If it had been against an individual, fifty-three per cent. interest would have been added and a judgment given for costs, more than $70,000 additional. The United States enjoying these exceptional advantages, and the claimant being without adequate remedy, was compelled to submit. The parties were not on equal ground, and as one of the chief reasons for the rule does not apply, its harsh features ought not to obtain. *Cessat ratione, cessat ipsa lax.* No one would for a moment hesitate to declare that the Company would never have voluntarily released a valid claim for $42,000; that such a release could only be obtained by duress and coercion is patent to every one. Is then justice so blind and the law so impotent that such a release cannot be set aside?

The judgment of the Court of Claims should be modified and amended by adding thereto the sum of $59,778.49, and as thus modified should be affirmed.

JOHN C. FAY,
Attorney for Appellants,
The Wm. Cramp & Sons
Ship and Engine Building Company.

HOLMES CONRAD,
EPPA HUNTON,
Of Counsel.

APPENDIX.

54th Congress, 2d Session. } HOUSE OF REPRESENTATIVES. { Document No. 69.

WILLIAM CRAMP & SONS SHIP AND ENGINE BUILDING COMPANY.

Letter from the Secretary of the Navy transmitting, under instructions from the act making appropriations for the Navy for the year ending June 30, 1897, a statement of the claim of the William Cramp & Sons Ship and Engine Building Company for extra compensation for the building of certain vessels.

DECEMBER 11, 1896.—Referred to the Committee on Claims and ordered to be printed.

NAVY DEPARTMENT,
WASHINGTON, *December* 8, 1896.

To the Senate and House of Representatives in Congress assembled:

The act making appropriations for the naval service for the fiscal year ending June 30, 1897, contains the following provision:

> "The Secretary of the Navy is hereby authorized and directed to examine claims against the Government which may be presented to him by contractors for the building of the hulls or machinery of naval

vessels under contracts completed since January first, eighteen hundred and ninety-one, where it is alleged that such contractors have been subjected to loss and damage through delays in the work under said contracts which were not the fault of said contractors, but were due to the action of the Government, and to report to the next session of Congress the result of said investigation, and whether said claims are, in his opinion, subjects for the jurisdiction of the Court of Claims or for the action of Congress upon the same."

Under authority of this law the William Cramp & Sons Ship and Engine Building Company has presented claims against the Government for loss and damage due to delays alleged to have been caused by the Government in the construction of the *New York*, the *Columbia*, the *Massachusetts*, and the *Indiana*, and copies of these claims are transmitted herewith. Accompanying the claims are statements setting forth at great length the matters upon which the same are founded. In each case it is alleged by the contractors that the delays complained of were due to the failure of the Government to supply the armor or other materials in accordance with the provisions of the several contracts under which these ships were being constructed, and in the case of the *New York* that further delay occurred by reason of the changes authorized by the Department in the plans and specifications.

Claims are also made for large amounts of interest due on sums the payment of which it is alleged was deferred by fault of the Government, for sums paid out for insur-

ance, and for other special losses arising by reason of circumstances particularly set forth in said statements.

The claims aggregate as follows: On account of the *New York*, $211,018.31; on account of the *Columbia*, $192,235.79; on account of the *Massachusetts*, $483,757.49, and on account of the *Indiana*, $480,231.90.

I have considered carefully the nature of these claims and the circumstances out of which they arose, and while not attempting to pass on the merits of the same or to determine the amount, if any, that should be allowed on account of the matters mentioned, the fact exists that there was delay in the completion of the contracts beyond the time prescribed therein, and that such delay was in some measure at least due to failure on the part of the Government to obtain and furnish to the contractors the armor for the vessels as required, and in my judgment the interests of justice demand that they should be referred to the Court of Claims, which can consider these matters with more deliberation and care than could be devoted to them by the committees of the two Houses of Congress.

In this connection attention is invited particularly to the provisions of the memoranda of agreements made with the contractors in modification of the contracts for the construction of the *Indiana* and the *Massachusetts*, dated, respectively, May 10, 1894, and February 1, 1896, copies of which are inserted in the statements of claim herewith on account of those vessels, wherein the contractors expressly released the Government from all and every claim for loss or damage theretofore sustained by

them by reason of any failure on the part of the Department to comply with the terms of said contracts, or on account of any delay theretofore occasioned by the action of the Department.

It will be observed that the contractors claim relief from the binding force of these agreements on the ground that the same were entered into by them under duress.

Very respectfully,

H. A. HERBERT, *Secretary.*

FILE COPY.

Office Supreme Court, U. S.
FILED.
APR 8 1907
JAMES H. McKENNEY,
CLERK.

IN THE

Supreme Court of the United States.

THE WM. CRAMP & SONS SHIP AND ENGINE BUILDING CO., *Appellant*,

vs.

THE UNITED STATES, *Appellee*,

and

THE UNITED STATES, *Appellant*,

vs.

THE WM. CRAMP & SONS SHIP AND ENGINE BUILDING CO., *Appellee*.

Nos. 263 and 264

Reply Brief of the Cramp Company.

JOHN C. FAY,
Attorney for Cramp Company.

EPPA HUNTON,
HOLMES CONRAD,
EATON CREECY,
Of Counsel.

IN THE

Supreme Court of the United States.

THE WM. CRAMP & SONS SHIP AND ENGINE BUILDING CO., *Appellant*,

vs.

THE UNITED STATES, *Appellee*,

and

THE UNITED STATES, *Appellant*,

vs.

THE WM. CRAMP & SONS SHIP AND ENGINE BUILDING CO., *Appellee*.

Nos. 263 and 264

REPLY BRIEF OF THE CRAMP COMPANY.

Whenever the record is at variance with the contentions of the Attorney General he seeks to smooth out his difficulties by suggesting that the findings "might have been better expressed" (Reply Brief, p. 2), or they are "not quite as full as might be desired" (p. 15), or "the court did not think it necessary" (p. 11); and when there is nothing in the record at all he supplies it by assertions, "that the Cramp Company never contended

it was anything else" (p. 2), or there was "no redoubt armor on the ship" (p. 13), and like expressions. We have not thought it necessary to go over each of these expressions in detail, but do not for that reason concede that he is correct in the assertion not specifically denied. We assume that the case is to be tried on its record unaided by the outside declarations of counsel. Following the course of the brief we take up in the order—

First.—The effect of the extension of time.

Second.—The effect of the final release.

Third.—Wharfage.

Fourth.—Insurance.

Fifth.—Preparation for trial trip.

Sixth.—Release of May 10, 1894.

First.—Extension of Time.

The Attorney General on page two of his reply brief gives only an extract from Finding IV. The full finding gives the reason assigned by the Secretary for extending the time, to wit, "*to thereby release the claimant from penalties.*" That is what the Secretary thought he was doing. He never dreamed he was discharging the United States from any legal liability it had incurred. The whole finding reads as follows:

> On December 4, 1895, and after the completion and delivery of the vessel at the time hereinafter stated, the Secretary of the Navy decided that the cause of delay for the period of two years in the completion of the vessel was due to the failure of the United States to furnish the claimant the ma-

terials contracted to be furnished by them within the time and in the order to properly carry on the work; and for that reason the time within which to complete the vessel, *and thereby release the claimant from the penalties provided for in the 19th paragraph of the contract, was on said date extended* by the Secretary of the Navy a corresponding length of time, to wit, to November 19, 1895, on which latter date the vessel so contracted for was completed and delivered.

He further contends that the extension of time could not be made till after the delay had ended. If he had noticed that the penalties for delay were to be deducted from the instalments as they became due, Article IX of Contract (Rec., p. 9 last line, p. 10 first line) "All such deductions from the contract price of the vessel to be made from time to time from any payment or payments falling due under this contract," he would have seen that every time a payment was made after November 19, 1893, it was the duty of the Secretary to decide whether a deduction should be made from such payment, and that extensions of time were to be made in advance, not to await the final completion and acceptance of the vessel. The findings do not show the date of the partial payments, but we do not think it will be disputed that several were made after the expiration of the contract period. We cannot conceive what advantage it was to the company to have the time extended, if the Attorney General's construction of the contract is correct, for if the Secretary did extend the time he would inflict upon the company a grievous wrong.

We are unable to understand what the learned counsel means on p. 5, reply brief, that "it is a matter of common knowledge that it (the armor) could not be manufactured rapidly." "Rapidly" is a relative term. If he means that it was a matter of common knowledge that it could not be manufactured within less than two years; then that common knowledge was denied to both the Navy Department and the Cramp Company, for while it could not be begun till ten months after the date of the contract and was to be delivered in time to be put on and a trial of the vessel had in twenty-six months thereafter, they both not only thought but agreed that it should be done; nor is it quite true, as stated on p. 37 of the original brief, that "it was a matter of common knowledge that much of it was of a kind that had never been made in the United States before," precisely the same kind of armor had been made before, the only difference was that this armor was *thicker* than that on the armored cruisers; they had side belts, casemates, barbettes, and turrets.

As there was no one to whom a claim for damages and delays could be presented, it is quite immaterial (as the reply brief, p. 6, claims) that no such claim had been presented up to May 10, 1894. On p. 7, reply brief asserts that in December, 1896, the contractors having undertaken to "dispute the effect of the extension," a judicial decision became necessary. This is wholly unwarranted. Such a construction was never claimed by any one, up to the filing of Mr. Binney's brief in the Court of Claims. The Navy Department

under the authority of Congress, had audited and Congress had paid every such claim. The Department of Justice had not set up any such defense in the Pneumatic Gun Carriage case (*supra*), and both the Navy Department and the Department of Justice had acquiesced in the decision of the Court of Claims. There were but four claimants under the class of claims. The Cramps, the Richmond Locomotive Works, Palmer & Co., and the Pneumatic Gun Carriage Co. Everyone except the Cramp Company have been paid for the damages caused by the delays, two upon the recommendation and audit by the Navy Department, and one by the Court of Claims, as will appear by public documents printed in an appendix to this brief. The Union Iron Works who built the Oregon were paid as the work progressed during the building of that vessel, so that both by the Executive, Judicial and Legislative Departments the validity of these claims have been acknowledged, and it is an entirely new defense that has been set up against the Cramp Company.

Second.—Effect of Final Release.

While the reply brief (p. 9) now admits that the Secretary had no power to pay unliquidated claims for damages for delay, and that it might therefore prevent him from obtaining a release for such damages, still it is claimed that because the contract provided for a release that it can be construed to embrace such a claim. That is not only a *non sequitur* but utterly illogical. These damages were no part of the cost of the construction of the vessel, while

the delay undoubtedly made it cost the Cramp Company more by reason of the disarrangement of their working programme, they are not allowed anything for that nor are they allowed anything for the additional premium on their bond. As already shown, this release only related to the contract price, it did not affect the extra work, the speed premiums, nor the changes of plans; they were to be settled for separately.

Third.—Wharfage.

It is not a fact that the Cumberland Basis which was dredged out to accommodate the Indiana was a part of the yard. The yard, its shops and machinery were used to store material, and prepare the armor to go on the vessel; much work had to be done to a plate of armor after it was delivered before it could be put on to the vessel; the bolts had to be fitted and the joints had to be trimmed; when delivered it was only finished "within reasonable manufacturing limits;" all this took up space in the yard and in the company's shops, and when it was ready to be put on the vessel, the vessel was towed up to the slip on which was the railroad that carried these huge pieces of armor to the water's edge. The upkeep of the yard was the repair of its shops and buildings and policing it. The court, in its allowance for wharfage, embraced the dredging, tug service and watchman.

Fourth.—Insurance.

The reply brief makes no mention of the subject of insurance.

Fifth.—Preparation for Trial Trip.

The suggestion in the reply brief for the United States that the contention of the Cramp Company that their offer of the Indiana of March 23, 1894, for trial between May 1st and 10th, 1894, was not an offer under Article III, is not warranted by the facts, and is specifically contradicted by the court's XIIth finding, R., p. 22. The court there finds that on "March 23, 1894, the claimant notified the Secretary of the Navy that the vessel, *other than the fitting of the armor*, had reached a stage of completion ready for an official trial, and proposed to offer said vessel therefor between May 1 and 10 following." As the only provision for the trial without armor was under Article III, the learned counsel must have entirely overlooked finding XII when he made that statement.

He also fails to realize that this armor was to be delivered in the "order" to carry on the work properly; that order is specified in the contract as *first*, the side belt, *second*, casement, *third*, turrets (there were six of these), *fourth*, redoubts (there were two of these), *fifth*, barbettes (there were four of these), and *sixth*, conning tower. *No other armor was involved, except these six classes of armor.* The United States was to furnish quite a variety of other armor, but the ship could be made seaworthy and be subject to a trial trip without any or either of these six classes, just as the seven previous vessels had been, and while this armor was part of her hull, it was not a structural part of the vessel. It was merely additional weight attached to and made part of

her hull, and this weight could be as well represented by pig lead properly distributed as armor. If all the armor was on and a trial took place under Article X the vessel to be "weighted to a mean draught of 24 feet" (line 20, p. 11, Record), and even on a final trial it had to be "weighted correspondingly" (line 22, p. 12, Record). It was neither new or unusual for a vessel to be weighted for a trial trip; in fact, it had been the usual custom to do so. To use a homely illustration, by comparing a ship with a house, the location of the armor might be described as if the *side belt* were the basement, and first story, *casement*, second and third stories, *turrets*, in the attic extending through the roof, and the *redoubts*, *barbettes* surrounding the turrets, and the *conning tower* on the roof.

The side belt extended from four feet below the water line to the protective deck; the casement, from the protective deck passing the berth deck to the main deck; the turrets, from the foundation just below the upper deck to above the deck, and the redoubt, barbette surrounding the turrets and the conning tower resting on the upper deck.

Another cogent reason why this order should be observed was the fact that the side belt was four feet below the water line at normal draft, and if this other heavy weight of armor was placed on her decks, it would sink here so deep in the water that the side belt could not be put on at all. There was no dry dock in the United States that could dock her with this weight on.

The learned counsel is mistaken on p. 13 of his reply

brief and p. 2 of his original brief in the statement that there was "*no redoubt armor.*" Both the contract and specifications required it and the vessel was so built. He has fallen into this error by not being advised what the armor was. It is denominated in the specifications as "redoubt," and served the same protection to these 13-inch turrets as the *barbette* armor served to the so-called 8-inch turrets. The designation of 8-inch and 13-inch turrets is very misleading, for this dimension has no relation either to the thickness of the armor or the size of the turrets, but relates solely to the caliber of the guns they contained. The 13-inch turrets carried two guns each of 13-inch caliber and the 8-inch turrets carried two guns each of 8-inch caliber and the thickness of their armor was 17 inches and 10 inches, respectively—and their inside diameter of approximately 35 and 20 feet, respectively; the redoubts and barbette armor was 17 inches and 10 inches, respectively. (See extract from specification, Appendix.) In the same way the protection for the gun shields are denominated "Sponson" armor in Finding III, and the learned counsel could as well say that the gun shields and armor protection for the guns was omitted as to say that there was no redoubt armor on the vessel because he does not find that particular expression in that finding.

On page 13 of reply brief the learned counsel is reluctant to admit that the mere perfunctory delivery of a small piece of armor which was not followed up with reasonable diligence would even technically fulfill the intent of the paragraph, although he candidly admits it

on p. 27 of his original brief, but destroys even this reluctant admission by boldly asserting there was "no unreasonable delay."

If not to even commence to deliver the side belt armor, the first required, until nearly ten months after the contract term expired, and not to finish its delivery for twenty-two months after its expiration, and waiting nearly eleven months after the casement armor was furnished before even beginning the side belt, does not constitute "unreasonable delay," we would like to be instructed as to how many years must elapse before delay can become unreasonable. He asserts that the findings do not state that this is inconsistent with "due diligence." Inasmuch as the court below rendered a judgment against the United States, it is very clear that the conclusion they reached was that these delays were not only unnecessary, but inexcusable.

Further, on pages 13 and 14, counsel is driven to maintain his argument to assume the absurd position that while the contract really means that a trial might take place without any armor on the vessel at all, it could not possibly mean that a trial could be had with any portion of it on; that is to say that the nearer a vessel is completed the less desirable it is to test her; and the more pig lead you put on her to compensate for the absence of armor the better it is. To give such a construction to that language violates every rule of common sense. The next paragraph accords with the construction that the Cramp Company has always contended for, to-wit: If at the time the

company had proceeded with the building of the vessel so far that it could not reasonably progress further without armor, which was the case in March, 1894. The United States candidly admits (reply brief, p. 15) "If *at that date* the Government had not *commenced* to deliver the armor for her side belt * * * "then the contractor was entitled to a trial trip." This is exactly what the Cramp Company claim, and the findings conclusively show (Finding III, p. 18) that on the 24th day of March, 1894, the United States had not even commenced to furnish the armor for the *side belt*, and we agree with the statement that the company was then entitled to a trial, but it was refused us. Whenever the counsel draws upon the contract our contentions are perfectly clear; it is only when he draws on his imagination that the issue is at all befogged. It is to be observed that this concession is drawn from a citation from the contract, but in the next paragraph he reaches a conclusion at war with the contract by interpolating the words, "*or any of the armor specified;*" this has no foundation in the contract and exists only by a draft upon his imagination. There are no words in the contract that justify the interpolation of the words *or any part of either of said classes of armor*, and without them the whole argument of the United States falls to the ground. The argument is that if an armor bolt or even a rivet had been furnished, the United States was at liberty to refuse a trial trip. The learned counsel seems to think the United States had no interest in the trial. Here was a pioneer vessel that was to defend the honor of our flag, to encounter the great war vessels of

other nations; it was the product of American genius; vast sums of public money had been voted to carry out the project; three were under construction and the country was anxious to see if it would meet the predictions of its designers; and yet the learned Attorney General calmly argues that the Navy Department had inserted in the contract some trick language by which he could indefinitely postpone the demonstration of its success. At the time that contract was made, the United States, as well as the Cramps, was eager to know and at the earliest possible moment whether a vessel of this weight would make the contract speed, and Article III was to accelerate, not to impede, an early trial; it was of the greatest importance to the United States as well as for the benefit of the contractors. The provision as to furnishing this armor was in good faith, and it meant just what it said; there was not lurking in the covenant any premeditated reservation, which, in the exercise of bad faith, a delivery of an "armor bolt" would do away with the whole purpose of the article. The language of the contract does not justify it, and to interpolate such words into it, would convert it into a covenant of bad faith.

The reply brief, p. 16, not only argues without facts but against facts, for while Finding XII (Rec.) directly shows that the Secretary first brought the subject of preliminary trial, and appointed a board of two experts to supervise the trial preparations, the brief insists "that it must not be inferred that the Secretary originated the idea of such a trip, but, on the contrary, that the company must itself

have brought the matter up at an earlier date." He further insists that such a trial would be a "departure from the terms of the contract." It was certainly not a departure from the terms of article III of the contract, as the contract was understood by both the contractors and the Department, and again he says (p. 17), "the Secretary might have appointed the board of officers six weeks sooner, *when the Cramp Company first brought the matter up.*" He did appoint a board of officers on March 6th, 1894, to supervise the trial trip preparations, when he himself first brought the matter up, and who put the vessel in condition for her trial trip. The second board did not pass upon her readiness for a trial trip under article III, nor did he.

Again he asserts (p. 18) "that as the proposed trial would be *useless*, the claimant ought not to have suggested it." "It does not appear that the Secretary was at all aware how useless it would be until after the board had reported." There is not a word in the record to justify the assertion that such a trial trip would be *useless*, nor did any board ever so report. It would have been silly for the Cramp Company to offer a vessel for a useless trial. The trial was to test the hull, machinery and speed, and if these did not come up to contract requirements, the Cramps were to pay the cost of the preparation and the cost of the trip and get no payments. The vessel was in better condition to test than it would be with *no armor at all on*, and as the learned counsel concedes that the contract does provide for such a trial trip, he is by this assertion forced into dilemma of charging both the Sec-

retary of the Navy as well as the contractors with solemnly providing in Article III for a *useless trial trip.* As seven previous vessels had been subjected to trial trips under the same conditions, none of which had proved *useless,* it would seem to be rather a wild flight of imagination.

Again he insists that the Cramps ought to have applied for a board to ascertain whether a trial would be "useful or not." If that was in accordance with the rules and regulations of the Navy Department, he is confronted with the fact that at least seven boards had already passed on that subject in the seven previous vessels, and one prepared this vessel for such a trial, while the other one in this case made no report on the subject whatever. They reported the vessel was not finished, which everybody knew, and that in the interest of the United States a trial should not take place until the vessel was fully completed and ready for delivery. They either did not approve of Article III or did not know anything about it, at any rate they did not report on it.

On p. 18 he insists that "the contract did not provide for a trial trip until the vessel was completed and ready for delivery," while on page 12 he inserts extract from the contract that provides for the very trial trip we asked for, and on p. 14 admits we were entitled to it. The cost of preparation was directly due to the delay; it grew out of the default of the United States in delivering armor; it is not founded on the Secretary's letter of March 9th. It was not in the nature of a new

promise, nor did it arise from an error of judgment of the Secretary, or upon a promise that the Secretary was not authorized to make. The case of Lee & Monroe, Whiteside *vs.* U. S. or Floyd Acceptances cases have no bearing on the question. It is respectfully submitted that the Court of Claims erred in holding the rule announced in those cases applicable to the cases at the bar. Their error was caused by entirely overlooking Article III of the contract which seemed to be utterly ignored.

Sixth.—Release of May 10, 1894.

The reply brief of the United States claims that the payment of twenty-three of the twenty-seven of the retained percentages seven months, *i. e.* (June 20, 1894), after the expiration of the contract period, was not then *legally due.* The court, however, finds as a fact that if it had not been for the default of the United States, not only these twenty-three percentages, but the whole contract price would have been paid to the Cramp Company by November 19, 1893. Instead of not being legally due, they were actually in default for over seven months.

The illustration on p. 24, reply brief, is not at all either apt or applicable. When money is borrowed it is usual to give obligations for its repayment, but it is not usual when paying a debt to take an obligation to return it on demand.

The findings do not show how much of the 28th, 29th, or 30th installments had been earned up to June 10, 1894, for the reason that until the 30th payment had

been earned it was useless to ascertain whether any one of the others had. The three payments really constituted one payment only, payable altogether, so it is not proper to assume that none of this work had been done because no estimate had been made. In fact, in view of Articles XII (Rec., p. 13), which authorized the Secretary to forfeit the contract if satisfactory progress was not being made at any stage of the work, would tend to show that the work was progressing, so far as the contractors were concerned, with satisfactory speed.

The reply brief (p. 27) abandons the Government's previous contention that an executive officer had power to settle claims for unliquidated claims, and now concedes that he has no authority of jurisdiction to settle or adjust them, but notwithstanding he may require and compel the release of such a claim; in other words, he cannot compromise it or pay it but he can discharge it by demanding its release.

No executive officer has any power or authority to pay any claim that the law does not authorize him to do, nor to pay anything more than what the United States justly owes and what the claimant has a just right to receive, and he has no power or jurisdiction to attach to that act any condition other than the discharge of that particular claim. If he could, then under the guise of obtaining a "release for damages," pay ten times the amount due. It would invite and protect the grossest kinds of fraud. The Secretary had no jurisdiction to deal with the question at all; no case is cited to establish the doctrine that an unauthorized officer may secure a

release which shall inure to the benefit of the United States, while a number of cases hold that in order to make a compromise effective it must be had with an officer clothed with authority to adjust the claim. (Comstock's case and cases cited, *supra.*)

The reply brief complains that the Court of Claims did not specifically find that the withholding of upwards of $700,000 as itemized on p of our original brief affected the finances of the company, and the assertion that it did is simple assumption. We confidently contend that it is a matter of common knowledge that this court will take judicial notice of that the withholding of such a vast sum of money from a ship building company in times of panic and with its army of workmen to pay off weekly, of necessity could not fail to produce financial distress.

The court will take judicial notice that at the time that even the financial condition of the United States was affected. Its gold reserve had fallen below its legal standard, and the United States was issuing bonds; there was a deficit in her Treasury, and although on May 10 she agreed to pay the Cramp Company its retained percentage, it was not until June 20, *forty days later,* was she able to meet her obligation.

In conclusion, the Cramp Company call attention to this fact that the judgment when amended as prayed in the cross appeal will *only partly reimburse* the company for ACTUAL CASH OUTLAY, OF MORE THAN TWELVE YEARS AGO. Not a cent of profit, nor of interest, nor for additional cost to them by the interruption of the work, or

additional premium on their bond, nor for the costs and expense of the long, expensive and protracted litigation. This meager amount is all that can now be recovered. When the splendid service performed by this magnificent vessel in the defending the honor of our country, the glory of our flag, and the prowess of our Navy at Santiago, it should bring the blush of shame to the cheek of every patriotic citizen to know that now after twelve years the reimbursement of the builder is not only unpaid, but its repayment is resisted by unreasonable, unconcernible and highly technical defenses.

JOHN C. FAY,
Attorney for Cramp Company.

EPPA HUNTON,
HOLMES CONRAD,
EATON CREECY,
of Counsel.

APPENDIX.

[*Extract from page 6 of Specifications.*]

Armor-Plating.

Side-Belt.—To be furnished by the Navy Department and worked as shown on the plans, extending from 3 feet above the normal load water line to 4 feet 6 inches below the normal load water line amidships, diminishing to about 4 feet 2½ inches below the load water at the ends, the outside surface to conform to the shape of the vessel with a thickness of 18 inches extending from the top of armor to 12 inches below the load water line, from which point it will taper to 8 inches in thickness at the top of armor shelf. * * *

Diagonal Armor.—This will be 14 inches thick and will be worked, as shown on the plans. * * *

Casemate Armor above Belt.—This will be worked as shown, 5 inches thick in all, made up of two ½-inch plates and one 4-inch plate. * * *

Turret Armor.—For the 13-inch guns to be 17 inches thick, and be worked as shown on the plans; the sizes of plates to be held to, as shown, if possible. * * *

Redoubt Armor.—This armor will be 17 inches thick, and the plates will be worked in one piece the whole depth of about 12 feet. * * *

Armor for 8-inch Barbettes and Turrets.—The barbette armor is 10 inches on the outer sides and 8 inches on the inboard sides, as shown on the detail plans. * * *

Armored Protection for 6-inch Guns.—To be shaped as shown on the plans. To be five inches thick, the upper and lower edges to be secured to the plating of the decks.

* * *

Armored Protection for the 6-pounder Gun on Main Deck.—To be shaped as shown on plans, two inches thick. * * *

Armored Protection for 1-pounders at the ends of the Vessel.—These guns will have the plating thickened to a total thickness of 2 inches in wake of the ports to act as a shield.

Statement of the Action Taken by the Executive, Legislative, and Judicial Department of the Government in the Cases of Claims Arising out of the Delays in Furnishing the Armor Plate to Contractors with the Navy Department.

There were four contractors with the Navy Department who made claims for damages arising out of the Department's failure to furnish armor according to the contract, namely: The Richmond Locomotive Works, The N. F. Palmer, Jr., & Co., The Pneumatic Gun-Carriage Co., of West Virginia, and the Cramp Shipbuilding Co., of Phila., Pa.

The Cramp Company presented its claims to Congress and asked for payment. Similar claims were presented by the N. F. Palmer, Jr., & Co., and the Richmond Locomotive Works, to Congress. Congress thereupon passed the act of June 30, 1897, cited in Appendix to original brief.

Soon after the date of this letter the Cramp Company entered this suit in the Court of Claims under the general law.

In the case of the Richmond Locomotive Works the Acting Secretary of the Navy, Honorable William McAdoo, Dec. 20, 1895, reported to Congress "the erection of the machinery on board the vessel was commenced, the contractors were seriously delayed and hindered in their work by the non-delivery of the armor and other hull material, and by the consequent failure of the Department to have the hull far enough advanced

to enable them to carry on their work systematically and with proper economy, or to make the required horse-power trial of the machinery when the same was eventually completed. From a consideration of all the circumstances of delay and hindrance to which the contractors were subjected in carrying out this work, and in view of the progress made by them under the disadvantages and obstacles they encountered, I am convinced that, had they not been unreasonably hindered by the circumstances above referred to, they would have completed the construction, erection, fitting and connection in place of the machinery, and would have had it ready for the horse-power trial, as required by their contract and the specifications thereto attached, within the time limited by the contract as extended on account of the fire at their works, or by July 30, 1903." (House Doc. No. 92, 54th Cong., 1st Sess.; reprinted as part House Report 60, 55th Cong., 2d Sess.)

The Secretary recommended an appropriation be made to cover the direct damage, interest on the money withheld, dock trial, etc., and stated that the contractors were justly and equitably entitled to this amount. (See HouseReport 60, 55th Cong., 2d Sess.). The contracts is printed in this report and shows the same form was used with all the contractors above referred to.

Congress by act approved May 7, 1889, appropriated the money in the following language:

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the Secretary of the Treasury be, and he is hereby,

directed to pay to the Richmond Locomotive and Machine Works the sum of sixty-nine thousand five hundred and fifty dollars and thirty-nine cents, out of any money in the Treasury not otherwise appropriated, in full of its claim for damages and losses incurred in the construction of the armored battleship Texas." (Stat., p.).

In the case of the N. F. Palmer, Jr., & Co., by reference to Senate Report 118, 58th Cong., 2d Sess., it will be seen that the Secretaryof the Navy, Honorable W. H. Moody, recommended in a letter dated January 10, 1903, that the sum of $63,620.59 be paid to the Palmer Company for its losses and damages in building the machinery for the battleship Texas.

The Bureau officers reported to the Secretary, so he states, as follows:

> "We are of the opinion that the claimants are justly entitled to some compensation, and that the amounts should be allowed on the following points:
> (1) Interest on reservations of contract payments for the time delayed through fault of the Government.
> (2) Expenses of dock trial over and above any expenses of such dock trial as is usual and necessary for every contractor to make at his own expense under the fullfilment of his contract.
> (3) Expenses of care and preservation of machinery during the time its acceptance was delayed through fault of the Government.
> (4) Additional cost of insurance and bond required by the contract for the same period.

"It does not appear from these papers but can be determined from the records of the Department whether the usual insurance on the machinery installed in the ship was maintained during the period of delay; but, if so, its expense is a just claim. The bureaus are of the opinion that the contract requires insurance to be maintained on the trial trip and, therefore, the claim should not be allowed.

(5) The performance of a large and special contract of this nature causes any contractor a large increase in general expense by the maintenance of an extra office force of clerks and draftsmen, experts, foremen, and superintendents of labor, and the claimants are justly entitled to recover for such part of this force as it was necessary to maintain during the period of delay caused by the Government.

"Undoubtedly the best methods of settling the amounts due the contractors on those several grounds would be to refer the case to the Court of Claims where they can be thoroughly and carefully determined, as recommended by the Department in its letter of December 8, 1896; but as such a long time has elapsed already since the contractors were justly entitled to compensation, the bureaus are of the opinion that a definite recommendation should be made to enable the Department and Congress to act without the delay and expense to both parties to the case, which would be further incurred by reference to the court."

The Secretary states that when the machinery was accepted the contractors executed the usual release provided for by the contract, but appended to it the following: "This release is given by us with the understanding

that we are not precluded thereby from presenting our claim on account of delays caused by the Government, and for the expenses incurred in the care and preservation of the machinery during such delays."

The Secretary also says, "The claimants are now barred by the Statute of Limitations from prosecuting the claims before the Court of Claims." The Secretary concludes his letter to Congress by saying: "The Department concurs in the views of the bureaus, and approves the statement made by them of the amount to which said company is entitled on account of the matters set forth." The Secretary also states in his letter that the cause of the delays on the part of the Goverment in the building of the vessels was mainly caused by the inability of the Department to get the armor. The result was that when the contractors for the machinery were ready for the delivery and installation the vessel were not far enough advanced to receive said machinery, but the contractors were subject to expenses and losses by reason of the unreadiness on the part of the Government."

Congress appropriated the amount recommended by Secretary Moody to be paid by the following act:

> *Be it enacted by the Senate and House of Representatives of the United Sates of America in Congress Assembled,* That the Secretary of the Treasury be, and he is hereby, directed to pay to N. F. Palmer, Junior, & Company the sum of sixty-three thousand six hundred and twenty dollars and fifty-nine cents, out of any money in the Treasury not other-

wise appropriated, in full of their claim for damages and losses incurred in the construction of the armored cruiser Maine, that being the amount recommended to be paid by the Secretary of the Navy.

The third contracting party who suffered by these delays on the part of the Government in the delivery of armor was the Pneumatic Gun Carriage Company. The court thoroughly considered this case and gave judgment in favor of the company for its damages and losses.

The sole remaining claim against the Government growing out of the failure of the Navy Department to deliver the armor is that of the case of the Cramp Shipbuilding Company, now pending before the Court of Claims. The letters of the Secretary of the Navy referred to herein contains the statement that there were extensions of contracts in both the Richmond Locomotive Works and the N. F. Palmer Company's case. It was also proved in the Court of Claims in the Pneumatic Gun Carriage case that extensions of contracts were given to it.

FILE COPY.

Office Supreme Court,
FILED.
APR 13 190
JAMES H. McKEN

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1906.

No. 263.

UNITED STATES, APPELLANT,

vs.

THE WILLIAM CRAMP AND SONS SHIP AND ENGINE BUILDING CO., APPELLEES.

No. 264.

THE WILLIAM CRAMP AND SONS SHIP AND ENGINE BUILDING CO., APPELLANTS,

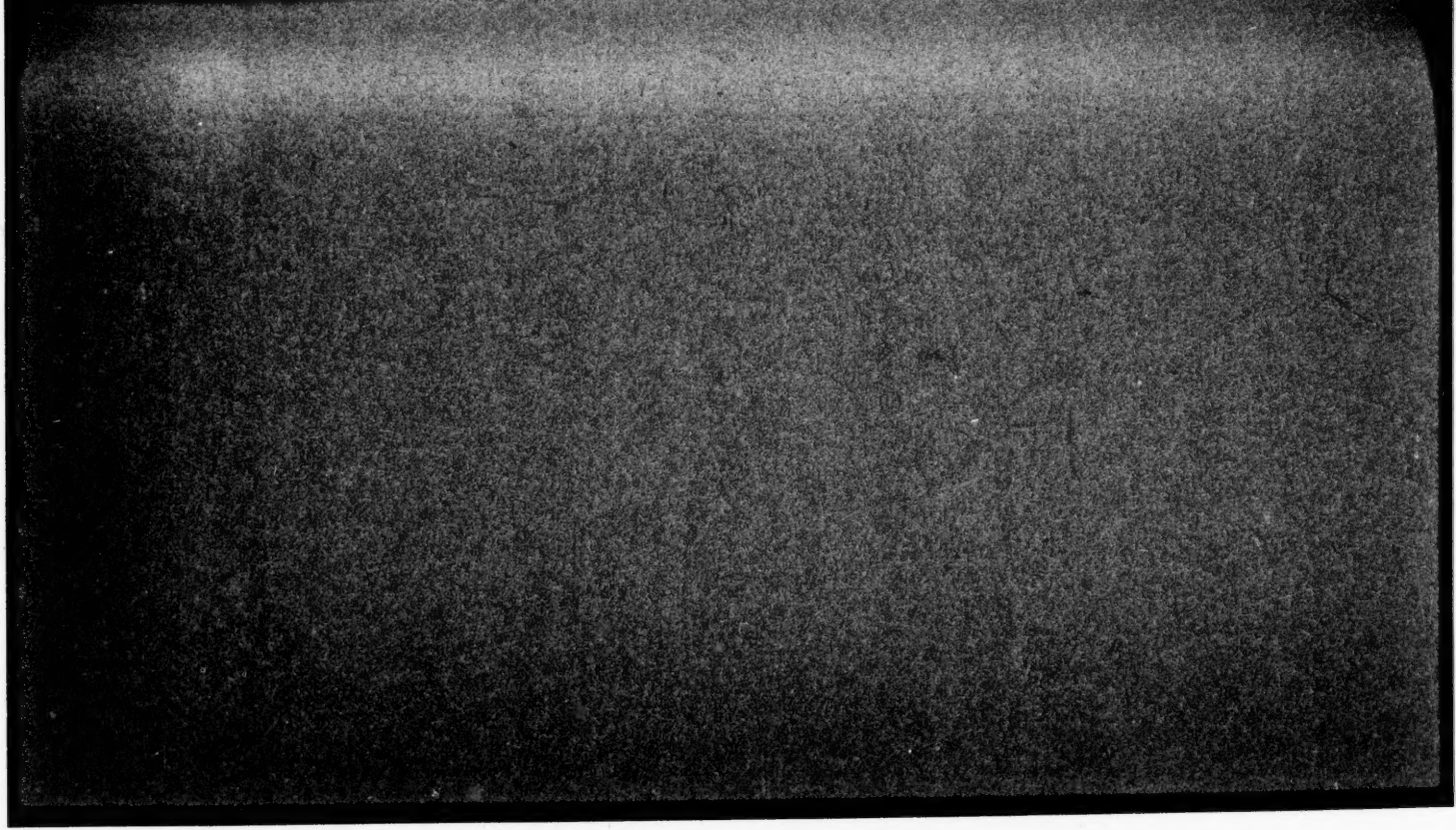
vs.

UNITED STATES, APPELLEE.

ADDITIONAL BRIEF FOR CRAMP AND SONS CO.

HOLMES CONRAD,
Of Counsel for the Cramp and Sons Company.

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C. 26170



SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1906.

No. 263.

UNITED STATES, APPELLANT,

vs.

THE WILLIAM CRAMP AND SONS SHIP AND ENGINE BUILDING CO., APPELLEES.

No. 264.

THE WILLIAM CRAMP AND SONS SHIP AND ENGINE BUILDING CO., APPELLANTS,

vs.

UNITED STATES, APPELLEE.

Additional Brief for Cramp and Sons Co.

A brief synopsis of the material facts of these causes as they appear in the record may aid to a clearer understanding of the grounds relied on in these appeals.

(1) By the contract between the parties (Record, pp. 5–16), it was agreed:

(*a*) That the Cramp Company should build a war vessel for the United States according to certain plans and specifications, and complete and deliver the same "on or before the expiration of three years from the date of this contract" (p. 9).

(*b*) That the contract price for the vessel should be $3,020,000; that the "payments shall be made by the United States in thirty equal installments, as the work progresses, with a reservation of ten per cent. from each installment;" that the payment of the last three installments shall not be made except as provided for in the eleventh clause of the contract (Record, p. 15); that the eleventh clause of the contract provided that if upon the trial trip it was found that the Cramp Company had fulfilled the contract on its part, and the vessel made 15 knots an hour, then the vessel should be "preliminarily accepted" and "payment of the last three installments of the contract price of the vessel, and of all reservations shall be made, subject, however, to a special reserve of $60,000 from and out of the reservation hereinafter provided for," but if the speed of the vessel shall fall below 15 knots an hour, "she shall be conditionally accepted, subject to deductions, as aforesaid, from the contract price of the vessel," provided all the requirements of the contract have been fulfilled by the Cramp Company (Record, pp. 11–12).

(*c*) When all the requirements of the contract have been performed and fulfilled by the Cramp Company it shall be entitled to receive all the reservations from the contract then remaining unpaid "on the execution of a final release to the United States, in such form as shall be approved by the Secretary of the Navy, of all claims of any kind or description under or by virtue of this contract."

(*d*) "In case the completion of the vessel, her machinery, fittings, and equipment, and the fitting, fixing, placing, and

securing of her armor, as aforesaid, shall be delayed beyond the period of three years, deductions shall be made from the contract price of the vessel for each and every day, during the continuance of such delay," &c. These deductions vary from $75 to $200 per day, and were to be made from any payments falling due under the contract (Record; p. 9).

(*c*) The third clause of the contract provides in substance that the Cramp Company shall furnish within ten months all working drawings and models showing the dimensions and shape of each piece of armor plate, "It being expressly understood and agreed that the party of the first part (Cramp Company) shall furnish armor, armor bolts and their accessories, and all the labor and material required in the constructive deck; that the party of the second part (United States) shall furnish all other armor, armor bolts and their accessories to be used in the construction of the vessel, including such as may be required in the construction of the belt, turrets, redoubts, barbettes, conning tower, gun shields, ammunition tubes, and in the protection of the guns and loading positions, trim such armor plates to the drawing or template (model) sizes and shapes within reasonable manufacturing limits, as set forth in the specifications, and drill and tap all necessary holes therein, as shown by said approved drawings and templates, *and deliver said* armor, armor bolts and their accessories, in such reasonable place or places in the shipyard of the party of the first part, as may be designated by the party of the first part, *and within the times and in the order required to carry on the work properly*, and that the party of the first part shall, at his own risk and expense, properly fit, fix, place and secure all the armor to the vessel, including the belt, turrets, redoubts and barbettes, conning tower, gun shields, ammunition tubes, and protection of the guns and loading positions, and furnish all other materials and labor required in the construction of the said vessel and her machinery, fittings, and equipments, as called for by the aforesaid drawings, plans and

specifications; provided, however, and it is expressly understood, covenanted and agreed, that if, upon the completion of said vessel, including hull, fittings, machinery, engines, boilers and appurtenances, and equipment, and all other work required under this contract, except the fitting, fixing, placing and securing of the armor for her side belt, casemate, turrets, redoubts, barbettes, and conning tower, the party of the second part *shall not have commenced the delivery* of such armor to the party of the first part, then and in such case the vessel shall be subjected to the trial trip provided for in the tenth clause of this contract, and if, at and upon such trial, all the conditions, and requirements relating thereto, except the fitting, fixing, placing and securing of the armor for the side belt, casemate, turrets, redoubts, barbettes and conning tower, shall be fulfilled, the vessel shall be accepted as provided for in the eleventh clause of this contract; and if the party of the second part *shall not have commenced the delivery* of the armor for the side belt, casemate, turrets, redoubts, or conning tower when the vessel is ready for her final trial, or within five months after either a preliminary or a conditional acceptance of the vessel, said vessel shall be finally accepted, and the cost of fitting, fixing, placing and securing the armor for the side belt, casemate, turrets, redoubts, barbettes and conning tower shall be ascertained, estimated and determined by a board of naval officers appointed by the Secretary of the Navy, the party of the first part shall be bound by the determination of said board, and such cost shall be deducted from the contract price of the vessel in the final settlement under this contract; but if the party of the second part *shall commence and continue with reasonable diligence the delivery of the armor* for the side belt, casemate, turrets, redoubts, barbettes, or conning tower of said vessel prior to her final trial, or within five months after either a preliminary or conditional acceptance of the vessel, the party of the first part shall fit, fix, place and secure all the armor to the vessel in accordance with

the requirements of this contract, and the drawings, plans, and specifications hereto annexed."

(All italics in the clause quoted are mine.)

(*f*) "All delays which the Secretary of the Navy shall find to be properly attributable to the Navy Department, or to its authorized officers or agents, or any or either of them, and to have been a delay operating upon the final completion of the vessel within the time specified therefor in this contract, shall entitle the party of the first part to a corresponding extension of the period herein prescribed for the completion of the vessel," &c. (Record, p. 10).

(2) The Court of Claims found as facts in this case the following, among others, viz:

> "Immediately after the making of the contract the claimant arranged and systemized a working programme for the construction of the vessel, by organizing its working force so as to coöperate with each other in harmony on coördinate work, and to secure economy in the construction of the vessel within the contract time, and to escape the penalties imposed thereby for delays. The claimant would have completed the vessel within the contract period, if it had not been for the failure of the United States to furnish materials within the time and in the order to properly carry on the work, which by the terms of the contract they had agreed to furnish. By reason of the failure of the defendants to furnish the materials, which, by the third clause of the contract, they had agreed to furnish, within the time and in the order as aforesaid, the completion of the vessel was delayed for two years beyond the contract period" (Record, p. 18).

The Court of Claims found (Finding V, Record, p. 19) that the cause why there was no preliminary or conditional acceptance of the vessel was "owing to the failure of the de-

fendant to furnish, in the order required, the material which they had agreed to furnish."

The court found that the vessel was completed and delivered on November 19, 1895 (Finding IV, p. 19), and was finally accepted by the United States on May 18, 1896.

ON THE CASE AS PRESENTED BY THE RECORD, THE CLAIMANTS HAD EARNED, AND WERE ENTITLED TO DEMAND AND RECEIVE, THE FULL CONTRACT PRICE OF THE VESSEL, LESS THE COST OF FITTING THE ARMOR, ON NOVEMBER 19, 1893.

The findings of fact by the Court of Claims show that claimants would have completed the vessel according to the contract by November 19, 1893, if they had not been crippled by the failure of the Government to furnish the material it had agreed to deliver. Claimants, then, had fulfilled the requirements of the contract on their part. All that the third clause of the contract imposed upon claimants had been done by them before the expiration of the contract period. In confirmation of this the United States had paid to claimants twenty-seven of the thirty equal installments of the contract price.

On November 19, 1893, at the expiration of the contract period, the United States had in its hands, of the claimants' money, so earned by them—

Ten per cent. of 27 installments of the contract price	$275,670 00
The three last installments of the contract price	306,300 00
	$581,970 00

These sums had been reserved by the Government as a security to it for the faithful performance by claimants of the contract on their part. It is found as a fact that claimants

had faithfully performed the contract on their part, and the contract, by its own limitation, expired on November 19, 1893. The United States were in default. They had broken the contract on their part, and on November 19, 1893, right of action accrued to claimants against the United States for such damages as claimants had sustained by the breach. Certainly no right remained and continued in the United States to withhold longer the money which had been earned by claimant and was reserved by the United States, as claimants' money, to secure the United States against loss by reason of claimants' breach. That contingency had passed and had now become impossible.

In Amoskeag Man. Co. *vs.* United States, 17 Wall., 592, the Government contracted with the company to make and deliver 6,000 carbines of a certain structure within six months from April 15, 1863. The contractors would have performed the contract but for delays caused by the Government. On April 5, 1864, the carbines were ready and were tendered and refused. In March, 1870, they were still in the hands of the contractors. The Company sued in the Court of Claims, and that court dismissed its petition. On appeal, this court reversed that judgment, saying, through Mr. Justice Miller:

> "But this is a narrow and incomplete view of the contract. It leaves out the claimant's rights in the matter. The claimant had a right, under the original contract, to deliver 6,000 carbines in six months, and have his pay, if he could make so many in that time. He could have made them all within that time, as found by the court, but for his consent to the request of the Government, to change, for its benefit, the structure of the weapon. As before stated, this request implied such an extension of time as was known to be necessitated by that improvement, and the Government must be bound by this reasonable intendment, as an individual would have been. As it is found, substantially, that the claimant was ready and offered to deliver within a reasonable time, he is

> entitled to recover such damages as he sustained by the refusal of the Government to receive and pay for the arms."

So the rule of damages recognized and enforced by this court in the case of United States *vs.* Behan, 110 U. S., 338, is applicable here, in seeking to determine damages sustained by these claimants by reason of the breach of contract by the Government. But it should be noticed here that profits earned, or which might have been earned, by these claimants form no part at all in the amount for which they seek judgment against the United States. They ask only for money actually earned by them and reserved by the Government, and for money actually paid out by them as a direct and necessary consequence of the two years' delay in completing the vessel to which they were subjected by the default of the Government.

It appears from the record (page 23) that they were subjected to actual, additional expenditures by reason of the two years' delay of..... $177,823 55
And to preparation of the trial trip, which was not made 17,514 94

THE AMOUNT OF $177,823.55, ACTUALLY PAID OUT BY CLAIMANTS IN MAINTAINING THEIR WORK DURING THE TWO YEARS BEYOND THE CONTRACT PERIOD, SHOULD BE REPAID TO THEM.

The Court of Claims recognized their right to be reimbursed this amount, but it allowed them only $135,560 of that amount and disallowed them $42,263.55, the balance of that amount, the court in its opinion saying (Record, p. 35): "We are not free from doubt on this branch of the case." The ground on which the court disallowed a part of these expenditures was that claimants had released the United States from so much of the entire amount as had been expended prior to May 10, 1894.

What was this release, and how was it obtained from claimants?

Finding of Fact No. V, on page 19 of the record, states the conclusion of the Court of Claims. The instrument of release appears on page 16 of the record. In its physical features it lacks nothing of due solemnity, save that while it speaks of "hands and seals," it is in fact an unsealed instrument, as appears by the absence of seals, which are prominent enough in the contract which this instrument purports to amend. It is dated on May 10, 1894, just six months after the contract which this claims to amend had expired by its own limitation and after and during the continued breach of that original contract by the United States. The consideration for this release is recited to be the payment to the claimants by the United States of "so much of the aggregate amounts of the last three installments of the contract price, and of the amount of the reservations from previous payments, as will leave in the hands of the party of the second part an amount sufficient, in the judgment of the Secretary of the Navy, to cover the special reserve of sixty thousand dollars provided for in the eleventh clause of the contract, the cost of all unfinished work, and all deductions likely to be made on account of deficiencies in speed, and all contingencies that are likely to arise."

So here is at least an admission by the Secretary of the Navy that on May 10, 1894, six months after the date of the expiration of the contract, the sum of $60,000 was enough to reserve to secure the Government against all possible contingencies of loss on account of the claimants.

Of course, the amount to be paid was very large, and had been held back by the Government for a long time, and, as we have tried to show, held back wrongfully and in disregard of the rights of the claimants. But claimants were in great straits; they had to have this money to keep themselves afloat; and so they did sign this instrument, and we are not permitted to say that they did not know what they

were doing when they signed. They signed it to release their money from the detention of the United States, or at least of the Secretary of the Navy.

In the case of United States *vs.* Cuba Mail S. S. Co., 200 U. S., 408, this court said:

> "Where a party pays an illegal demand, with full knowledge of the facts which render it illegal, without an immediate or urgent necessity therefor, or unless to release his person or property from detention, or to prevent an immediate seizure of his person or property, such payment must be deemed voluntary and cannot be recovered back."

And to the same effect are Swift Co. *vs.* United States, 110 U. S., 23; Roberts *vs.* Frank Brothers, 132 U. S., 22; Railroad Co. *vs.* Commissioners, 99 U. S., 541, and Little *vs.* Bowers, 134 U. S., 547.

But, alluring as the bait held out to these claimants appeared to be, what were its real substance and value? After stating the consideration, there follows a proviso, which is that the claimants shall first give bond, with approved security, conditioned to pay back the money so paid to them, "on demand being made by the Secretary of the Navy therefor, for indemnity of the party of the second part of the amount so paid."

That is, if the claimants will execute a solemn release of the United States from all claims for damages by reason of any failure on the part of the United States to comply with its contract, then they will let the claimants receive this money, provided that they pay it back immediately or at any time that the Secretary may demand it from them.

One competent to contract may release another from all liability to him on claim for damages, but to support such release there must be a valid consideration. The payment by the debtor to the creditor of the amount of his debt before the same is due may be a valid consideration, but if the

debt is due and payment is withheld by the debtor until the creditor execute a release of other claims, that is not a valid consideration.

Here the United States withheld from the claimants "reservations" amounting to $581,970 solely as a security to indemnify the Government against loss by reason of the failure of the claimants to fulfill the contract on their part. It is clearly admitted on the part of the United States, in the "amended contract" of May 10, 1894, that on that date at least the sum of $60,000 was sufficient to afford the indemnity required, and the residue was then paid over to claimants. This of itself is all that is needed to show that the Government had no right to retain in its hands more than that amount.

But, looking to the terms of the "release," we submit that they do not embrace the items of the demand here made by claimants. The demand here is not for *damages*. The items of the demand appear on page 23 of the record. They are for amounts of money actually paid out by claimants, at the implied request of the United States, after the expiration of the contract period and during the two years in which the claimants were engaged in receiving and placing the long-delayed armor, as it was delivered by the United States.

After the expiration of the contract claimants might have declined to continue the work, and have relied on their claim against the United States for their breach of the contract; but, in the interest of the United States and for their benefit alone, and impliedly at their request, claimants did continue and completed the vessel. These items of expense were incurred under those conditions, and the Court of Claims has found as a fact that they were rightfully incurred, and abated the amount in part only because of the alleged release of such part by claimants.

THE EXPENDITURE OF $17,514.94 BY CLAIMANTS IN PREPARATION FOR THE TRIAL TRIP PROVIDED FOR IN THE THIRD CLAUSE OF THE CONTRACT SHOULD HAVE BEEN ALLOWED.

The Court of Claims (Record, p. 23) say:

> "If the claimant is entitled to recover the expense so incurred in the preparation for the preliminary trial of the vessel, the amount, as verified by the officers of the Navy, and which we find reasonable, was $17,514.94."

By the third clause of the contract (quoted in full above) it is provided (near bottom of page 7 of Record) that upon the completion of the vessel by contractors, except as to the fitting of the armor, if the United States shall "not have commenced the delivery of such armor to the party of the first part, then, and in such case, the vessel *shall be* subjected to the trial provided for in the tenth clause of this contract," &c.

On March 23, 1894, the contractors notified the Secretary of the Navy that the vessel would be ready for its trial trip "between May 1 and 10 following."

The Secretary appointed a board of officers to inquire into the matter.

That board reported that the vessel would not be ready for the official trial trip, in accordance with the tenth article of the contract, by May 1, 1894, and that such trial trip should not, in the interest of the Government, take place until the vessel was fully completed and ready for delivery" (Record, p. 23).

Now note: Claimants had not reported that the vessel would be ready for the trial trip *by May 1*, 1894, but that it would be ready for such trip *between May 1 and May 10*, and the board of officers do not contradict this statement. They were content to report that it would not be ready by

May 1. Contractors had not proposed "an official trial trip in accordance with the tenth article of the contract," but they had proposed a trial trip in accordance with the third article of the contract, and no reason is given in the report of the board of officers why such trial trip was not allowed. The board of officers report that "such trial should not, in the interest of the Government, take place until the vessel was fully completed and ready for delivery." An official trial trip, under the tenth article of the contract, could not take place until then; but that was not the trial trip that was requested.

That a trial trip under the third clause of the contract was contemplated by the Secretary of the Navy more than one month before the board of officers was appointed to "inquire into the matter" is evident from the letter of the Secretary to the contractors, of March 9, 1894 (Record, p. 22), in which he says:

> "In view of the fact that the trial trip of the *Indiana* will take place at an early date, and as you are probably now making preparations therefor, your attention is invited to the tenth clause of the contract for the construction of that vessel, which provides that the expense of a successful trial of the vessel shall be borne by the Government."

Another board of officers was appointed to "inform themselves as to what expenses you incur in preparing the vessel for trial." This board reported, and no objection was found to the amount of the expenses (Record, p. 22). So it is manifest that the proposed trial trip was well known to the Secretary long before the date fixed upon by the contractors, viz., between May 1 and May 10. Not only did he know it to be a "fact that the trial trip of the *Indiana* will take place at an early date," but he also knew exactly, from the report of his own board, the amount of the expenses incurred by

the contractors in the preparation for such trip, and no objection was found to the amount of such expenses.

On what ground, then, is it proposed to cast upon the contractors the burden of the expenses incurred by them in preparation for this trial trip? In his letter of March 9, 1894, written to the contractors, as the letter itself states:

> "In view of the *fact* that the trial of the *Indiana will take place at an early* date, and, as *you are probably now making preparation therefor,* your attention is invited to the tenth clause of the contract for the construction of the vessel, which provides that the expense of a successful trial of the vessel shall be borne by the Government," &c.

Exactly two weeks after the date of that letter, the contractors write to the Secretary and advise him that they will "offer the vessel for an official trip between May 1 and 10 following."

Here the Secretary recognizes as a "fact" that the trial trip will take place, and that the Government shall bear the expense of a successful trial. He knows, of course, that preparation must be made by the contractors for such trip, and that they must incur great expense in such preparation. He does not warn them not to make such preparation, not to incur such expense; that the time for a trial trip has passed; that no trial trip of the vessel will be allowed until she is fully armored. He gives no warning, but rather by his letter gives encouragement to them to proceed, and actually sends a board of officers to the contractors to ascertain the amount of the expenses of preparation already incurred by them. That board reports the amount, and no exception is taken to it. But, more than a month after the date of his letter to the contractors, he appoints, on April 12, 1894, another board, who reported that the vessel could not be ready for the trial trip on the first of May, and that such trip should not "in the interest of the Government take place

until the vessel was fully completed and ready for delivery." This board did not report that the vessel would not be ready for the trial "between the first and the tenth of May," the period fixed by the contractor. When that board made its report the probability is that all the expenses of the preparation for the trial trip had already been incurred by the contractor. Why did the Secretary allow this expenditure, when all the facts were within his knowledge? Why did he not appoint his board to "inquire into the matter" on March 9, when he wrote his letter to the contractors; or on March 20, when the contractors notified him when they would be ready for trial? Can it be possible that the Secretary, well knowing—as he subsequently announced—that the Government was in default, and that such default had subjected these contractors to enormous expense, for which the Government would have to account; and believing further that the trial trip, between the first and tenth of May, would prove successful, and that then he would be compelled, under the eleventh clause of the contract, to allow the vessel to be "preliminarily accepted, and payment of the last three installments of the contract price of the vessel and all reservations to be made" except the further reservation of $60,900? Can it be that this was the real reason why, "in the interest of the Government," the trial trip should not take place until the vessel was fully completed and ready for delivery?

The conclusion cannot be evaded that had the trial trip taken place between the first and tenth of May it would have proven successful. The Court of Claims by its findings substantially shows that it has found that the contractors were at no time in default; that the vessel would have been completed within the contract period if the Government had fulfilled its part. The contractors had fully performed all that lay upon them to do. Surely, then, the Government can find no support, from the law or the facts, for its contention that the burden of this expense of $17,514.94, which the Court of Claims finds was a reasonable

amount for the preparation (Record, p. 23), should be shifted from the shoulders of the Government and cast upon the claimants because the Secretary of the Navy did arbitrarily, and regardless of the rights of the claimants, refuse to allow the trial trip to take place.

If, as we insist, the word "commenced" shall be construed as though it was followed here, as it is on the next page, in the closing part of the same clause, by the words "and continued with reasonable diligence"—a construction admitted by counsel for the Government on page 27-28 of his original brief—then it must be allowed that a *right had accrued to these claimants* to have such trial trip and to have credited to them all the benefits that would have resulted therefrom.

THE RIGHTS OF CLAIMANTS, DEFINED AND SECURED BY THE CONTRACT WITH THE UNITED STATES, COULD NOT BE IMPAIRED OR DESTROYED BY ANY ACT OF THE SECRETARY OF THE NAVY NOT AUTHORIZED BY THE CONTRACT OR BY LAW.

The third clause of the contract has been quoted in full because by it the rights and obligations of the parties to the contract are prescribed and defined. It states explicitly what each of the parties is required by the contract to do and the order in which they are to do them.

It prescribes that the United States shall deliver at the shipyard of the claimants certain designated armor for the vessel, and that such armor shall be so delivered "within the times and in the order required to carry on the work properly." Six times is that armor specified, piece by piece, in this third clause of the contract, and each time it is specified in exactly the same order, viz., "side belt, casemate, turrets, redoubts, barbettes, and conning tower;" and this was so carefully observed that there might be no question as to the order in which the armor would be needed and must be delivered. The necessity for this is obvious. The armor must be put on in the order in which it was practicable, and not

as the convenience or caprice of the parties might suggest. The side belt extended along the sides of the vessel, being three feet above and four feet six inches below the normal water line. It was of iron or steel, was eighteen inches thick, and weighed many tons. This had to be put on first of all, before the vessel was loaded down with other matter and while its normal water line was apparent. It should have been fully delivered before November 19, 1893, and yet it is a fact found by the Court of Claims (Record, p. 19) that the United States did not commence to deliver this armor until August 13, 1894, and did not complete the delivery until August 6, 1895.

It is urged rather strenuously in the reply brief of the Attorney General that the contract only required the Government to "commence the delivery" of this armor, and the duty of the Government under this contract was fulfilled by the delivery of a bolt or a pin in the name of the whole. But the first impressions of the writer of the briefs were the best, for in the principal brief for the United States, on page 27, it is said:

> "Moreover, the contractor would obviously have the same right if the Government, having once begun to deliver the armor, should not continue the delivery with reasonable diligence, for it cannot have been intended that merely beginning to deliver the armor, without more, would meet the requirement of this provision."

And indeed in the very third clause, lower down (on page 8), there appears this phrase: "but if the party of the second part shall commence and continue with reasonable diligence the delivery of the armor for the side belt, casemates, redoubts, barbettes, or conning tower of said vessel," &c.; and so, we assume, will the expression be construed elsewhere in the contract.

The Secretary of the Navy could not impose or increase the claimants' liabilities by extending the time for the completion of the vessel.

The ninth clause of the contract provided (Record, p. 10):

> "All delays which the Secretary of the Navy shall find to be properly attributable to the Navy Department, or to its authorized officers or agents, or any or either of them, and to have been a delay operating upon the final completion of the vessel, within the time specified therefor in this contract, shall entitle the party of the first part to a corresponding extension of the period herein prescribed for the completion of the vessel,"

with a proviso, however, that this can be done only on the application of the contractor.

The author of the principal brief for the United States says on page 31, as to this feature of the contract:

> "In short, there is nothing else that this provision for an extension of time can mean than just this, that the extension changes the date for the completion of the vessel, *and wipes out all liability for delays before the date was changed.*"

That is, in a contract by which the Government binds itself to deliver material within a certain time and in a certain order, and fails altogether to do so, and thereby imposes heavy expenses upon the other party to the contract, the Government can wipe out its liability by merely extending the time for the completion of the work; and that it can do this even more than two years after the expiration of the contract period, and after it alone has been in default, and after the vessel has been actually completed and delivered.

Now, as matter of fact, and indeed of law, as this court held in the Amoskeag Co. case, in 17 Wallace, 592, where the delay was caused by the Government, no provision of law and no authority from the Government was needed to

give to the contractor a corresponding extension of time. He had it, if he wished it, by operation of law; and the extension by the Secretary, as it appears in the Finding IV (Record, p. 19), was wholly unnecessary and of no effect. The claimants had asked for no extension of time. They were not in default. They had fully complied with all the requirements of the contract as to them. They had incurred no penalties or forfeitures and were under no liabilities, under the contract, after November 19, 1893.

What, then, is the explanation of this contract on the part of the Secretary of the Navy in 1894? Do not the facts of history warrant the suggestion that the only reason why these claimants were not paid in full the money that was due to them was that the United States did not at that time have the money in the Treasury and was unwilling openly to repudiate its debts, but preferred to employ these small devices to put off the insistent creditor. The Treasury was empty and the Government had to borrow money on its bonds, and on no other reasonable hypothesis can the course pursued toward this creditor be explained.

HOLMES CONRAD,
Of Counsel for the Cramp and Sons Company.

FILE COPY.

263 and 264.

OFFICE OF THE CLE
RECEIVED
MAY 25 1907
SUPREME COURT U

IN THE

Supreme Court of the United States.

THE UNITED STATES

vs.

THE WM. CRAMP & SONS SHIP AND ENGINE BUILDING COMPANY,

AND

WM. CRAMP & SONS SHIP AND ENGINE BUILDING COMPANY,

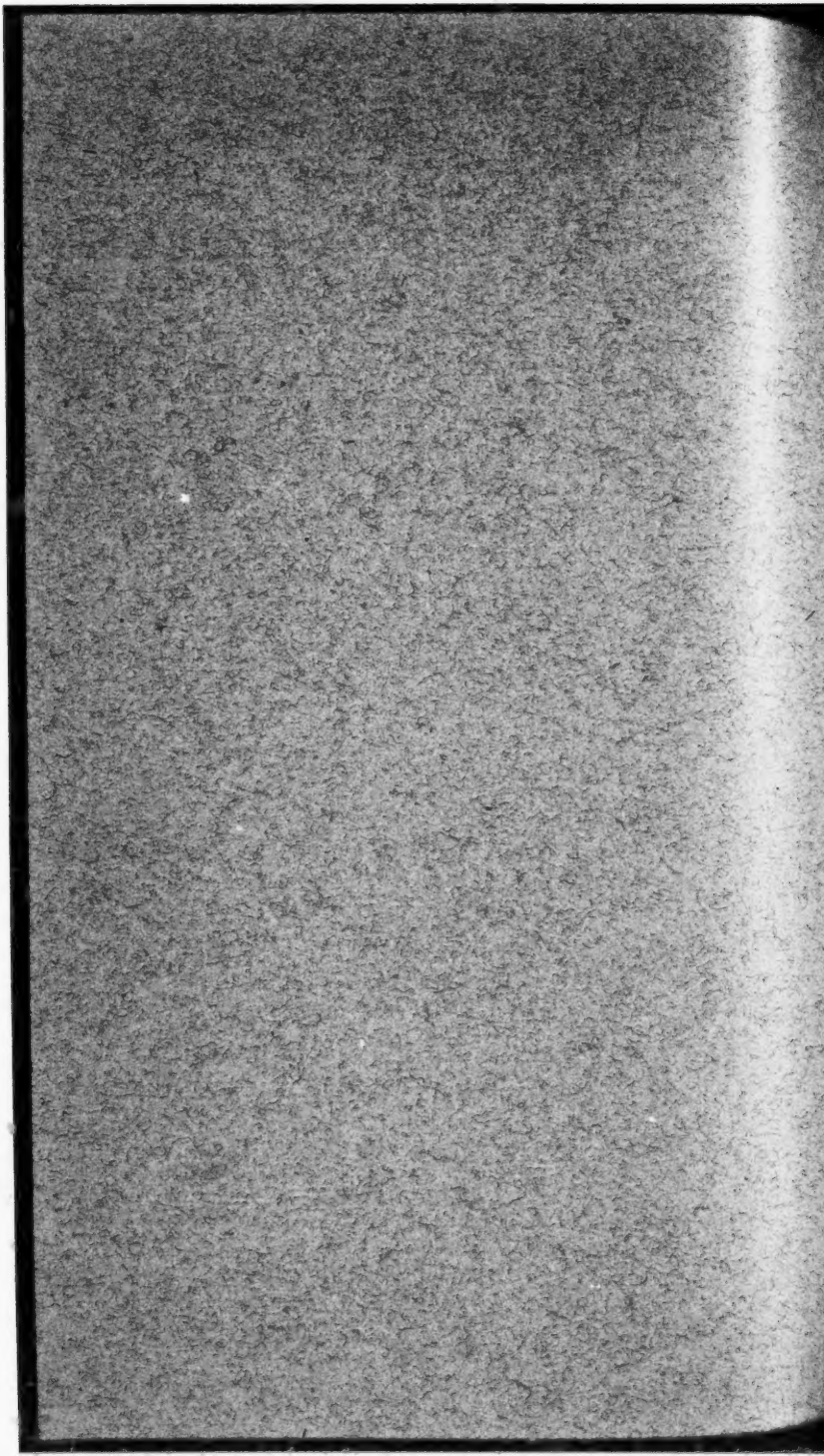
vs.

THE UNITED STATES.

Petition for Rehearing by The Wm. Cramp & Sons Ship and Engine Building Company.

HOLMES CONRAD,
JOHN C. FAY,
EPPA HUNTON,
C. E. CREECY,
Atty., and of Counsel for the Cramp Co.

LAW REPORTER PRINTING CO., WASHINGTON D. C.



IN THE

Supreme Court of the United States.

THE UNITED STATES

vs.

THE WM. CRAMP & SONS SHIP AND ENGINE BUILDING COMPANY,

AND

WM. CRAMP & SONS SHIP AND ENGINE BUILDING COMPANY,

vs.

THE UNITED STATES.

Petition for Rehearing by The Wm. Cramp & Sons Ship and Engine Building Company.

To the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Your petitioner, The William Cramp & Sons Ship and Engine Building Company, respectfully pray that a rehearing be allowed in the two above-entitled causes, in which the opinion and judgment of this court were announced on the 13th day of May, 1907. They are advised that such rehearing should be allowed on the following grounds, viz:

The course of reasoning, as shown by the opinion of the court, on which its judgment is founded, discloses

such a disregard of certain material facts, and misinterpretation of others, as warrants the belief that these cases have not received from the court that degree of consideration which the rights of the petitioners and the magnitude of the interests involved are entitled. The court announces, in the opening of its opinion, as its view of the case—

> "This case turns on the release executed by the building company on May 13, 1896."

And further—

> "That which was to be released was all claims of any kind or description, under or by virtue of said contract. Manifestly included within this was every claim arising not merely from a change in the specifications, but also growing out of delay caused by the Government. The language is not alone 'claims under,' but 'claims by virtue' of the contract . . . 'claims of any kind or description.' All the claims for which allowance was made in the judgments of the Court of Claims, come within one or the other of these clauses. It may be that, strictly speaking, they were not claims under the contract, but they were clearly claims by virtue of the contract. Without it no such claims could have arisen."

The exact language of the contract, in the sixth paragraph of the nineteenth article, is:

> ". . . on the execution of a final release to the United States, in such form as shall be approved by the Secretary of the Navy, of all claims of any kind or description under or by virtue of this contract."

And the court adds, in the opinion, that—

> "Stipulations of this kind are not to be shorn of their efficiency by any narrow, technical, and close construction."

Petitioner has no disposition to invoke such rule of construction, nor does it appreciate the subtle refinement of the fancied distinction between the words "under" and "by virtue of." Petitioner asks for no other rule than that so often laid down by this court in other cases, and which as late as in United States *vs.* Stage Company, 199 U. S., 423, it expressed as follows:

> "The same principles of right and justice which prevail between individuals, should control in the construction and carrying out of contracts between the Government and individuals."

It wishes to be protected from that construction which was reprobated by this court in the Manufacturing Company *vs.* United States, 17 Wall., 595, where, in a case like this in many features, this court, through Mr. Justice Miller, said, speaking of the judgment under review:

> "But this is a narrow and incomplete view of the contract. It leaves out the claimant's right in the matter."

That is the objection which petitioners respectfully now urge to the opinion and judgment of the court in these cases.

Petitioner now says, in support of its prayer for a rehearing of these cases, that the claims asserted and demanded in these causes are not "claims under or by virtue of the contract." They have no connection with the contract. They might readily have accrued had the contract never existed. They are for money paid out at the request, and for the sole use and benefit of the United States, by claimant, after the expiration of the contract period.

By the terms of the contract, it was provided that the vessel—

> "shall be completed and ready for delivery to the United States on or before the expiration of three years from the date of this contract"—

that is by November 19, 1893. It was not completed before November 19, 1895.

The Court of Claims found as a fact that—

> "By reason of the failure of the defendants to furnish the materials, which, by the third clause of the contract they had agreed to furnish, within the time and in the order, as aforesaid, the completion of the vessel was delayed for two years beyond the contract period."

The third clause of the contract, which is by far the most important and controlling clause in the contract, appears to have escaped altogether the attention of the court. It expressly provides that if the contractors complete the vessel, except as to the fitting of the armor, and the United States have failed, at the time of such completion to furnish the armor, that then the contractors *shall* have a trial trip, and if on such trial the vessel be found complete, except as to the armor, *said vessel shall be finally accepted*, and the cost of fitting the armor shall be ascertained, and then deducted from the contract price.

The vessel was ready and tendered for the trial trip, but the same was not allowed under conditions, already pointed out in the briefs, and which are not creditable to the then representatives of the United States.

After the contractors had performed the contract on their part, and after the vessel was completed, except as fitting the armor, and after the contractors had been allowed $2,700,000 of the $3,000,000, the contract price, and after the vessel had thereby become the absolute property of the United States, and after the contract period had long expired. Then the question arose, "what is to be done with this vessel?" The United States had not furnished the armor as it had agreed. It informed the contractors that they did not know when they could fur-

nish the armor. The time was unknown, indefinite, unascertainable by the United States or the contractor. What shall be done with this vessel during this uncertain and indefinite period? How is it to be protected, guarded, preserved, and insured? There was nothing in the contract requiring the contractors to do it. The contractors had no insurable interest in it. They had no lien on it. They had been allowed the full amount of money earned by them under the contract (although the United States yet retained in its hands certain per cents of it for security). It can not be disputed that, as a matter of legal right, the contractors, after the 19th November, 1893, might have declined to undertake the care and preservation of the vessel, until the United States was able to furnish the armor for it. They might have required the United States to remove the vessels from their shipyards, so as to allow them the free use of the yards for other work. They might themselves have removed the vessel to the League Island Navy Yard, and informed the United States of it, saying that they needed their shipyard for other work, but they would be ready to fit the armor whenever it was supplied by the United States. Suppose this had been done, and the two years had then elapsed during which time the United States had not been able to furnish the armor, surely the vessel would have to be protected, cleaned, painted, and the shipyard maintained and kept up, and the insurance on the vessel paid by some one, and the wharfage for the vessel provided at the expense of some one. At whose expense? Is it true, then, as stated in the opinion of the court, that the claims for such outlays would have arisen under or by virtue of this contract. Can it be fairly insisted that "without it (the contract) no such claims could have arisen." If the vessel had spent the two years at the shipyard of any other persons than the Cramps—if any

other shipbuilder had agreed to take care of it during these two years; and he had expended exactly the amounts, and for the objects set forth on page 23 of the record, would he not have had just and proper claims against the United States, and would such claims have arisen under or by virtue of this contract?

The eleventh finding of fact is:

> "During the two years delay, the claimants were required to, and did keep the vessel insured for the benefit and protection of the United States."

Of course the United States could not *require* the claimant to do anything of the kind, claimant had to keep it insured during the three years of the contract, but it will hardly be contended that if the United States delayed ten years in getting the armor, they could have "required" claimant to have kept the vessel insured during all that time. "Required" here, means requested.

Now, is it ingenuous, reasonable, or fair to say, and to assign it as a reason for the judgment announced, that these claims were under or by virtue of or had any connection with the contract.

No provision of the contract can be indicated by which such expenditures as those made by these claimants, were contemplated, or provided for. The third article of the contract, justly considered, excludes such construction. By that article the contractors, in just the exigency that arose here, were allowed to require the United States to accept the vessel, without the armor, and as a consequence, defray all the expenses of its future care and preservation.

The claims here asserted in these causes arose out of an implied contract which was not formed until after the expiration of the formal sealed contract, on which, the opinion asserts "this case turns." Just how these two transactions are connected, with each other, or how

the latter was "by virtue of" the former, is not indicated in the opinion of the court.

The case of Lawson *vs.* The Wallasey Public Board, 11 Queen's Bench Division, page 229, affords a striking analogy to the facts of these causes, and the opinion of the court delivered in 1883, by Lord Denman is in striking contrast with the opinion here, in its method of construction. In that case Lawson had contracted with the board to dredge the bed of a river in a stated time, for which he was to receive £5,000. A certain staging, erected by a former contractor, stood in the way of the work, and the contract provided that the board should remove it in due time, and that if it was not removed in time to allow Lawson to complete his contract in the time stated, that the contract period would be extended. A further provision was—

> "if any difference shall arise between the local board and the contractor, concerning the work hereby contracted for, or any part thereof, or *concerning anything in connection with this contract*, such difference shall be referred to the engineer, and his decision thereon shall be final and binding on the local board and the contractor."

The staging was not removed in time, and Lawson claimed damages for the injury to which he was subjected by the delay. The engineer undertook to decide the matter; Lawson brought suit to recover the amount of his damages. The local board contended that the engineer's decision should be final between the parties, because the claim "was in respect of a matter in connection with the original contract." But the court, speaking through Lord Denman, said:

> "We think there are two clear answers to this contention. First, we think that such a dispute is not 'a difference concerning a thing connected with the contract.' When the parties contracted

> they never contemplated that the engineer would have to decide any such dispute. The dispute is one arising from a breach of an implied contract which is not a part of, or necessarily connected with, the contract under seal. In order to bend a contractor to the certificate or decision of an architect or engineer appointed by the party for whom the work is done, there must be very conclusive language in the contract."

In the case at bar, it is far more manifest that the claim asserted by the claimant has no connection with any undertaking to be done or performed by him, under the provisions of the sealed contract. The provisions of that contract are stated clearly and distinctly in numbered paragraphs. Each expresses its own distinct feature and terms. No one of these can be tortured into embracing expenditures to be made by the contractors, for the care and preservation of the vessel during an indefinite period, in which the United States may be trying in vain, to obtain the armor which it had contracted to furnish within the three years of the life of the contract. Surely it is plain to the ingenuous and right seeking mind, that these expenditures were not on account of anything connected with the sealed contract—that they are not damages suffered by the contractors by reason of "delay caused by the government" or for a change in the specifications or for any "breach by the government of that contract" and, that not arising out of the contract, they were not embraced in the "release executed by the building company on May 18, 1896" on which it is said "the case turns."

Petitioners respectfully urge that the implied contract under which they advanced $177,823.55 for the use and benefit of the United States, for the care, preservation and maintenance of the vessel, for two years after the expiration of their contract, had no connection with the

sealed contract under which they had built the vessel, but constituted of itself an independent and distinct cause of action. That they stand as to this claim in the same relation to the United States that any other person would stand, who, having had no contract with the Government for the building of the vessel, had yet, at the request of the Government laid out his money for the care and preservation of the property of the Government.

The opinion further says:

> "As bearing upon this matter it may be noticed that while the release was signed and the contract between the building company and the Government closed on May 18, 1896, this action was not brought until August 10, 1897, nearly a year and a quarter thereafter."

The only warrant for this statement, or rather for the inference which it is intended shall be drawn from it, was a statement made at the bar by one of the counsel for the United States, to the effect that these claims were an afterthought—were not thought of until long after the date of the release.

It might be a proper and adequate reply to say that under the law these claimants had six years within which to assert their claims in the courts, and that no presumption against them is warranted by their exercising a right so derived. It might be further met by a *tu quoque*, in this, that when the suit was brought the defendant did not then or at any time later plead this alleged release, in bar of the plaintiff's demand, but that such ground of defense was an "afterthought."

But the real and substantial reply to the intimation is that it is not true in point of fact, as the public records abundantly attest. Within a very few days after the date of the alleged release, viz, May 18, 1896, these claimants did lay the matter before Congress, and asked that the Secretary of the Navy be empowered by an act of Con-

gress to adjust and settle the claims of these claimants, and Congress did in response to that request, enact as follows by act approved June 10, 1896:

> "The Secretary of the Navy is hereby authorized and directed to examine claims against the Government, which may be presented to him by contractors for the building of hulls or machinery of naval vessels under contracts completed since January 1, 1891, where it is alleged that contractors have been subjected to loss and damage through delays in the work under said contracts, which were not the fault of said contractors, but were due to the action of the Government, and to report to the next session of Congress, the result of said investigation, and whether said claims are, in his opinion, subjects for the jurisdiction of the Court of Claims, or for the action of Congress upon the same."

Chapter 399, 29 Statutes, p. 374, approved June 10, 1896. This was only twenty-two days after the date of release.

The Secretary of the Navy did make his report to Congress bearing date December 8, 1896. It may be seen in full on page 38 of the brief for Cramp Company of Mr. John C. Fay. We commend that report to the attention of this court, for this, that, while the Secretary does refer to the amended contract of May 10, 1894, as containing a release of claims by the contractors, he nowhere, by any intimation, refers to the receipt of May 18, 1896, as containing any release of any claims whatever. Surely he, the officer who prepared that instrument, and knew what was intended by it, would not have failed to call attention to it, if he had supposed that it had any such significance as the court has attached to it. The Secretary does advise that the claims be referred to the Court of Claims and that justice so demands. As Congress took no further definite action upon it, as soon

after Congress adjourned as was at all practicable the claimants brought their suit in the Court of Claims, as suggested by the Secretary's report. And this disposes of the insinuation that claimant's suit was an afterthought, but it suggests another presumption that is more creditable, and more worthy of consideration. Why did the Secretary of the Navy advise that these cases be sent to the Court of Claims, if he knew, or thought, or had intended by the receipt of May 18, 1896, that it should operate as a release of these very claims. With what show of reason can it be now held that such was the intended purpose and effect of that instrument, when the author of it, who was the officer of the Government most concerned in it has by his conduct and official report disclaimed any such intent or meaning? This same Secretary was also the author of the instrument dated May 10, 1894, which was the one really relied on by the counsel of the Government, as effecting a release of part of these claims. If this Secretary intended the latter instrument to have the same effect as the earlier, why did he employ such different terms and language in the two instruments? It is worthy of note that in the one of May 10, 1894, the language is:

> ". . . the party of the first part hereby releases the party of the second part from all *and every claim for loss or damage hitherto sustained* by reason of any failure on the part of the party of the second part to comply with its contract, or on account of any delay hitherto occasioned by the action of the party of the second part."

While the language of the instrument of May 18, 1896, is that the claimant—

> "does hereby remise, release and forever discharge the United States of and from all, and all manner of debts, dues, sum and sums of money, accounts reckonings, claims and demands whatsoever, in

law or in equity, for or by reason of, or on account of, the *construction of said vessel under the contract aforesaid.*

It is doing violence to language and is at war with fair dealing to insist that the claims here demanded were "on account of the construction of said vessel under the contract aforesaid." They plainly had no connection with the construction of the vessel, but accrued after the said vessel had been constructed, so far as the work of the contractors was concerned. Why should the Secretary report that he had a partial release, and suppress a total release? So, too, they were not incurred by reason "of any failure on the part of the party of the second part to comply with its contract, or on account of any delay hitherto occasioned by the action of said party of the second part." Doubtless, if the United States had not delayed to furnish the armor, they would have furnished it, and had they furnished it, the delay of two years, during which period these expenses were made necessary, would not have occurred. But the claims here asserted are not for *damages* in any proper, legal sense—that is, they are not for breach of the contract by the United States, nor for any tort committed by the United States. They are for money paid, laid out, and expended by these claimants, at the request of the United States, and for its use and benefit.

Because great wrong and injury will be done to these petitioners by the opinion and judgment announced, they pray that the causes may be reheard.

HOLMES CONRAD,
JOHN C. FAY,
EPPA HUNTON,
C. E. CREECY,
Atty., and of Counsel for the Cramp Co

Supreme Court of the United States.

Nos. 263 and 264.—October Term, 1906.

263 The United States, Appellant,
vs.
The William Cramp & Sons Ship & Engine Building Company.

The William Cramp & Sons Ship & Engine Building Company, Appellant,
264 *vs.*
The United States.

Appeals from the Court of Claims.

[May 13, 1907.]

On November 19, 1890, the William Cramp & Sons Ship & Engine Building Company entered into a contract with the United States to construct what was called "Coast-line Battleship No. 1," afterwards known as the battle ship Indiana, for the sum of $3,020,000, the ship to be completed and ready for delivery to the United States within three years from the date of the contract. As a matter of fact the vessel was not completed and delivered until November 19, 1895, but as the delay was occasioned by the United States no damages were recoverable from the building company on account thereof. On August 10, 1897, the company commenced this action in the Court of Claims to recover the sum of $480,231.90. The elements of its claim are thus stated in its petition:

For time of organization and plant lost in waiting for armor, materials, etc., to be furnished by United States	$144,379.50
For special wharfage, 730 days, at 1 cent per ton per day	74,825.00
For general care and maintenance of vessel, including coal, firemen, engineers, watchman, canvas awnings, wooden covers, keeping clean, removing snow, dust, etc., extra painting, tug hire, moving derrick, etc., 730 days, at $135 per day	98,550.00
Additional cost of insurance	34,462.55
Interest on money borrowed caused by delays of United States which prolonged final settlement	60,499.91
Extra trial trip made necessary by construction and completion of vessel being delayed by United States	17,514.94
For loss due to running the official trial of "Indiana" with a foul bottom, as owing to the delay caused in the completion of the vessel it was impossible to clean and paint the bottom	50,000.00
Total	$480,231.90

On May 10, 1894, as appears from the findings made by the Court of Claims, an agreement was made between the parties by which moneys not then due by the terms of the original contract were paid, the stipulation in this new agreement being:

"But such payment shall not be made until the party of the first part has given bond with approved security conditioned for the return to the party of the second part of the amount so paid, upon demand being made by the Secretary of the Navy therefor, for indemnity of the party of the second part against loss or injury by reason of such payment, and in consideration of such advance payment the party of the first part hereby releases the party of the second part from all and every claim for loss or damage hitherto sustained by reason of any failure on the part of the party of the second part to comply with its contract or on account of any delay hitherto occasioned by the action of said party of the second part."

The time intervening between this agreement and the final completion and delivery of the vessel was one year six months and nine days, and that time was made the basis for the computation of damages, as will appear hereafter.

On May 18, 1896, after the completion and delivery of the vessel, the balance of the money due on the contract was paid, and a release and receipt executed by the building company in the following terms:

"Whereas, by the eleventh clause of the contract dated November 19, 1890, by and between The William Cramp and Sons Ship and Engine Building Company, a corporation created under the laws of the State of Pennsylvania, and doing business at Philadelphia, in said State, represented by the president of said company, party of the first part, and the United States, represented by the Secretary of the Navy, party of the second part, for the construction of a seagoing coast-line battle ship of about ten thousand tons displacement, which for the purpose of said contract is designated and known as 'Coast-line battle ship No. 1,' it is agreed that a special reserve of sixty thousand dollars ($60,000) shall be held until the vessel shall have been finally tried; provided that such final trial shall take place within five months from and after the date of the preliminary or the conditional acceptance of the vessel; and

"Whereas by the sixth paragraph of the nineteenth clause of said contract it is further provided that when all the conditions, covenants, and provisions of said contract shall have been performed and fulfilled by and on the part of the party of the first part, said party of the first part shall be entitled, within ten days after the filing and acceptance of its claim, to receive the said special reserve or so much thereof as it may be entitled to on the execution of a final release to the United States in such form as shall be approved by the Secretary of the Navy, of all claims of any kind or description under or by virtue of said contract; and

"Whereas the final trial of said vessel was completed on the eleventh day of April, 1896; and

"Whereas all the conditions, covenants and provisions of said contract have been performed and fulfilled by and on the part of the party of the first part;

"Now, therefore, in consideration of the premises, the sum of forty-one thousand one hundred and thirty-two dollars and eighty-six cents ($41,132.86), the balance of the aforesaid special reserve ($60,000), to which the party of the first is entitled, being to me in hand paid by the United States, represented by the Secretary of the Navy, the receipt

whereof is hereby acknowledged, The William Cramp and Sons Ship and Engine Building Company, represented by me, Charles H. Cramp, president of said corporation, does hereby for itself and its successors and assigns, and its legal representatives, remise release and forever discharge the United States of and from all and all manner of debts, dues, sum and sums of money, accounts, reckonings, claims and demands whatsoever, in law or in equity, for or by reason of or on account of the construction of said vessel under the contract aforesaid.

"In witness whereof I have hereunto set my hand and affixed the seal of The William Cramp & Sons Ship and Engine Building Company this eighteenth day of May, A. D. 1896.

[SEAL.] CHAS. H. CRAMP, *President.*

Attest: JOHN DOUGHERTY, *Secretary.*"

The Court of Claims found for the claimant in the following items and amounts:

The reasonable value for the use of the claimant's yard, machinery and tools, and for superintendence in the construction of the vessel, including the general upkeep of the yard chargeable to the Indiana, $3,000 per month, making	$54,887.67
The reasonable cost of the proper care and protection of the vessel during the two years' delay, including expense of cleaning the bottom, furnishing material and painting, temporary awnings and tents over caps left for the introduction of turrets, additional scaling to remove rust before painting, electric lighting, keeping up steam to prevent freezing of valves, wetting down decks, going over machinery, and keeping vessel free from snow, dust, ice and debris, from May 10, 1894	36,591.78
Wharfage from May 10, 1894, including the dredging of a basin to accommodate the vessel	17,808.00
The proportionate expense, for the period from May 10, 1894, of the cost of insurance during the two years' delay	26,272.55
	$135,560.00

And rendered judgment against the Government for $135,560. From this judgment both parties appealed.

Mr. Justice BREWER delivered the opinion of the Court.

This case turns on the release executed by the building company on May 18, 1896. It is contended by the claimant that it applies simply to claims springing out of the construction of the vessel, and therefore has no application to the matters for which the judgment was rendered against the Government. The word "construction," the company says, is limited to the mere matter of building; that is, the furnishing of materials, the doing of work, and does not include delays or other matters outside the building of the vessel.

To rightly understand the scope of this release we must consider the conditions of the contract, and especially the clause in it which calls for a release. The contract was a large one, the price to be paid for the work

and material being over $3,000,000, and the contract was evidently designed to cover all contingencies. Provision was made for changes in the specifications, for penalties on account of delays of the contractor, deductions in price on certain conditions, approval of the work by the Secretary of the Navy, forfeiture of the contract, with authority to the Secretary to complete the vessel. The last paragraph contains the stipulations as to the amounts and times of payment with authority for increase of the gross amount upon certain conditions. The sixth clause of this paragraph makes special provision for the last payment, to be made "when all the conditions, covenants, and provisions of said contract shall have been performed and fulfilled by and on the part of the party of the first part" and "on the execution of a final release to the United States in such form as shall be approved by the Secretary of the Navy, of all claims of any kind or description under or by virtue of said contract." Evidently the parties contemplated and specially provided by this stipulation that the whole matter of the contract should be ended at the time of the final release and the last payment. That which was to be released was "all claims of any kind or description under or by virtue of said contract." Manifestly included within this was every claim arising not merely from a change in the specifications, but also growing out of delay caused by the Government. The language is not alone "claims under," but "claims by virtue" of the contract—"claims of any kind or description." All the claims for which allowances were made in the judgment of the Court of Claims come within one or the other of these clauses. It may be that, strictly speaking, they were not claims under the contract, but they were clearly claims by virtue of the contract. Without it no such claims could have arisen. Now it having been provided in advance that the contract should be closed up by the execution of a release of this kind it cannot be that the company, when it signed the release, understood that some different kind of release was contemplated. It must have understood that it was the release required by the contract—a release intended to be of all claims of any kind or description under or by virtue of the contract, and that the form of words which the Secretary had approved was used to express that purpose. With that release stipulated for in the contract the company signed the instrument of May 18, 1896, which in terms purported to "remise, release and forever discharge the United States of and from all and all manner of debts, dues, sum and sums of money, accounts, reckonings, claims and demands whatsoever, in law or in equity, for or by reason of or on account of the construction of said vessel under the contract aforesaid." Now whatever limitation may be placed upon the words "for" or "on account of" the construction the provision for the release of all claims and demands whatsoever, "by reason of the construction of the

vessel under the contract aforesaid," is a recognition of the contract, and includes claims which arise by reason of the construction of the vessel under it. "By reason of" may well be considered as equivalent to "by virtue of." It is only by reason of the performance of the contract in the construction of the vessel that these claims arise. But for the contract, and the construction of the vessel under it, there would be no such claims. No payment of moneys not due is necessary to sustain this release. It is under seal, and the contract is itself full consideration. As of significance it must be borne in mind that the release referred specifically to the provisions in the sixth paragraph of the nineteenth clause of the contract which provided for the character of the release. Indeed the general language of the release itself and the number of words of description in it show that it was the intent of the Secretary of the Navy to have a final closing of all matters arising under or by virtue of the contract.

Stipulations of this kind are not to be shorn of their efficiency by any narrow, technical and close construction. The general language "all and all manner of debts," &c., indicates an intent to make an ending of every matter arising under or by virtue of the contract. If parties intend to leave some things open and unsettled their intent so to do should be made manifest. Here was a contract involving three millions of dollars, and after the work was done, the vessel delivered and accepted and this release entered, claims are presented amounting to over $500,000. Surely the parties never intended to leave such a bulk of unsettled matters. As bearing upon this matter it may be noticed that while the release was signed and the contract between the building company and the Government closed on May 18, 1896, this action was not brought until August 10, 1897, nearly a year and a quarter thereafter.

We are of opinion that the parties by the release of May 18, 1896, which was executed in performance of the requirements of the original contract, settled all disputes between the parties as to the claims sued upon.

The judgment of the Court of Claims is reversed and the case remanded with instructions to enter a judgment on the findings for the defendant.

Mr. Justice McKenna and Mr. Justice Moody took no part in the decision of this case.

True copy.

Test:

Clerk Supreme Court, U. S.